

**ENVIRONMENTAL DISPUTE RESOLUTION: MEDIATION, AN
EFFECTIVE ALTERNATIVE TO LITIGATION?**

by

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THESIS ABSTRACT

"Environmental Dispute Resolution: Mediation, an effective alternative to litigation?"

The 1980's have seen an increase in the diversity and complexity of environmental disputes resultant of the competing demands of economic development and environmental protection. Nowhere is this more evident than in Tasmania.

Environmental disputes in Tasmania are handled by a number of judicial and administrative systems, each with its own "package" of legislation, infrastructure, processes and procedures. Dissatisfaction with the inadequacies and adversarial nature of these systems has been expressed by members of the judiciary, government, industry and public interest groups .

This thesis examines the potential of environmental mediation as a proven, non-adversarial process for the resolution of site specific and public policy disputes both within current systems and as a strategy in its own right .

It is concluded that environmental mediation is of value in environmental decision making and that it can be effectively incorporated in existing Tasmanian dispute resolution systems. A case is also put for the use of mediation as a viable alternative to present methods of environmental dispute resolution.

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CHAPTER 1

INTRODUCTION: THE NEED FOR A REVIEW OF ENVIRONMENTAL DISPUTE RESOLUTION (EDR) IN TASMANIA

1.1 Background of study

In the past 10 years or so, environmental disputes have become a feature of life in Tasmania. In a resource rich state with a depressed economy, the highest rate of unemployment in Australia, and a unique environment including spectacular wilderness areas of world heritage status, competing pressures for economic development and conservation have inevitably resulted in conflict. Effective natural resource management is essential for Tasmania's future, as all involved parties appreciate. The conflict arises over the nature and direction of management - resource exploitation or resource preservation .

There is no easy way out of this dilemma. Environmental disputes are primarily about politics, and it is a potentially explosive mix of power, values and emotions that is manifest in an environmental dispute. Tasmania is a veritable pressure-cooker of environmental conflict, fuelled by competing interests, a vigilant media, parochialism, and the isolation of an island state.

To date, Tasmania has survived the destructive fallout of some of the most divisive environmental disputes in Australian history, all the more devastating in social effect because of the closely-knit nature of Tasmanian society. There is no escape from either the inevitability of environmental issues or from contact with disputants. Not only are these disputes socially divisive but they are costly, time consuming and divert resources that could be more productively used for the development of alternative economic, environmental, and social activities.

There is therefore a critical need to develop more constructive, long term methods of environmental dispute resolution than exist at present.

Tasmania's environmental dispute resolution (EDR) systems are modelled on, and so are comparable with, those in existence in other states and overseas. One of the difficulties is that the judicial and administrative systems which constitute the primary, formal methods of EDR, were developed at a time when there was less competition for abundant resources, there was less awareness of the value of the environment (in both the social and economic sense), and there were fewer articulate, well-organized public interest groups. In addition, the magnitude and rate of technological change is escalating in an unprecedented manner.

Environmental decision making systems have proven unable to keep pace with the rate and nature of these changes. To remain relevant, effective and credible, new approaches must now be considered. This has already happened overseas.

Paradoxically, by being 10 years behind, Tasmania could in fact be 10 years ahead of the other Australian states if it so chose - a pacesetter in environmental dispute resolution. That is, Tasmania is in a position to learn from the mistakes of other decision-making regimes both interstate and overseas and so not adopt approaches that have little prospect of success. Its small size and the strength of its formal and informal networks should mean that its decision making structures and functions can be changed relatively quickly (though a major problem is inherent conservatism and the difficulty of attitudinal change). Thus, by noting successes and failures elsewhere, Tasmania is in a position to select the approach or combination of approaches that is the most appropriate and effective for its unique environment and its political, social, and economic culture; an approach that will minimize the potential for environmental conflict. Environmental mediation is one such possibility.

Mediation is a form of non-adversarial or Alternative Dispute Resolution (ADR), ADR being the collective term for a number of dispute resolution processes which constitute alternatives to the traditional adversarial judicial approach. The core processes are accepted as arbitration, mediation, and independent-expert appraisal (Adler 1987a). Other processes include regulation-negotiation, "Med-Arb" (Mediation-Arbitration) and conciliation. ADR techniques have been successful in the resolution of commercial, labour, neighbourhood, and environmental disputes in

Canada, USA, China, and Japan. They are as effective in the resolution of two party, single issue disputes as they are in the multi issue, multi party disputes that characterize environmental issues.

Mediation has proven effective in both site specific and public policy disputes in the USA and Canada. Environmental mediation is a voluntary process in which disputing parties in a public or environmental dispute jointly explore and attempt to resolve their differences with the assistance of a neutral third party professional, a mediator .

In mediation the focus is on the relationship between the parties and the achievement of a mutually satisfactory outcome . Although the process is voluntary, a binding outcome can be convened via a written agreement and/or legal contract if necessary.

Proponents of environmental mediation argue that it is flexible; is able to address the substantive rather than merely the procedural issues in the dispute; and is less costly and less time consuming than traditional, adversarial judicial and administrative processes. They also consider that a negotiated and agreed outcome is more likely to be adhered to by the parties to the dispute.

Detractors of mediation counter that it is compromise in another guise and so is unlikely to be acceptable to disputants who are strongly committed to a particular position or set of values; that it does not address the critical issue of power imbalance between developers and public interest groups; and that mediated agreements may not be legally enforceable.

Nevertheless, both proponents and detractors agree that environmental mediation has emerged strongly in the 1980s, that it has been significant in environmental dispute resolution, and that, as such, its use should be seriously considered and evaluated.

1.2 Aim of study

The aim of this study is to demonstrate that non-adversarial dispute resolution strategies such as environmental mediation are an effective and efficient approach to the resolution of environmental disputes in Tasmania.

Environmental mediation is particularly appropriate in the resolution of site-specific and public policy disputes, which constitute the majority of environmental disputes in Tasmania. It can be incorporated into existing structures and systems or it can "stand alone" in its own right.

Options will be examined and an integrated package of strategies will be recommended .

1.3 Objectives

The specific objectives of this study are:

- (i) to examine the existing EDR systems in operation in several Tasmanian jurisdictions - sea fisheries, mining, environmental protection, town and country planning and forestry - using case studies to illustrate the systems in action;
- (ii) to review the effectiveness of environmental mediation, in EDR overseas and in Australia;
- (iii) to consider the potential of environmental mediation as a means of environmental dispute resolution within existing systems in Tasmania; and
- (iv) to consider options for the future of environmental mediation in Tasmania .

1.4 Structure and methodology

Within Australia, environmental dispute resolution has been primarily addressed from either a legal or from a planning/land-use perspective. There has been no integrated approach to environmental dispute resolution nor has there been a study of environmental mediation (to the best of the author's knowledge). To say that the field is embryonic is an understatement .

A multifaceted methodology has been selected as the most appropriate way to address the complex matter of environmental dispute resolution. It has included:

- (i) literature review;
- (ii) review of relevant legislation, regulations, policies, reports, and associated procedures;
- (iii) discussions with disputants;
- (iv) discussions with Heads of Departments and senior resource managers;
- (v) observations of public meetings.
- (vi) observations of cases being heard by the Environment Protection Appeals Board, Planning Appeal Board, Court of Petty Sessions, and the Mining Warden's Court; and

In order to demonstrate the current management of environmental disputes in Tasmania, case studies were identified for analysis in each of five resource management jurisdictions. These were fisheries (marine farms), mining, environment protection, land-use planning and forestry. Although most of the agencies were generally supportive of the author's research, direct access to information (other than that indicated above) was limited, there being no Freedom of Information legislation in Tasmania.

Another limitation was the length of time taken to process an objection and appeal in both judicial and administrative systems so that many cases were not decided within the 12 month period of the study, adjournments being common.

Case studies were analysed and jurisdictional and administrative issues and inadequacies identified (see Chapter 4) in all jurisdictions with the exception of forestry. The author was not permitted to observe a Forestry Tribunal hearing, the explanation being that they were private, as distinct from public, hearings and were usually held in the field.

The number of cases listed in each jurisdiction was limited during the study period and the author was usually dependent on the relevant agency to notify her of their occurrence.

In the case of the marine farm dispute, the author was contacted directly by the potential objectors who requested her assistance as a mediator. The applicant and the agency agreed to this, however the procedural inflexibility of the appeals system excluded a negotiated and/or mediated resolution.

The author was notified of the two mining disputes by the agency. Subsequent disputes were unable to be included within the time frame of the study.

The environment protection case study was the only one available for analysis within the time constraints of the study. Other cases were listed but were adjourned for lengthy periods for various reasons and so not available for analysis.

The land-use planning dispute was the only one available to the author.

The Forestry Commission would not permit author access to Tribunal hearings for the reasons mentioned previously.

Chapter 1 considers the need for a review of EDR in Tasmania, given acknowledged inadequacies in traditional adversarial systems by members of the judiciary, government, developers and interest groups . The objectives and methodology of the study are also outlined.

Chapter 2 reviews the literature on judicial and administrative approaches to environmental decision-making and in so doing establishes the context for the operation of existing systems.

Chapter 3 reviews the literature on the practice of environmental mediation overseas, noting that most of the source material is from the USA and Canada. It appears that there is at present very little Australian literature available on environmental mediation per. se. with the exception of papers by the author.

Chapter 4 examines the ways in which environmental disputes are presently handled in Tasmania with reference to 5 jurisdictions and their associated courts and administrative tribunals. Case studies are used to illustrate the operation of the systems.

Chapter 5 identifies opportunities for the incorporation of environmental mediation into existing Tasmanian judicial and administrative dispute resolution systems. A case is also put for the use of mediation as a strategy in its own right.

Chapter 6 concludes that there is considerable potential for the effective use of mediation to benefit all parties and recommendations are made for future directions for Tasmania.

1.5 Limitations of the study

Limitations in the dimensions and methodology of this study are acknowledged. There are a number of matters that impinge on a study of environmental dispute resolution, in particular the influence of political factors on the potential for success of negotiation and mediation in the resolution of environmental disputes. The impact of political factors on the use of mediation warrants a study in its own right and as this thesis is a minor thesis in a coursework Masters, manageable

boundaries have had to be drawn and the thesis has thus focused on an ideal type.

Limitations are as follows:

- (i) inability to examine all the Tasmanian environmental dispute resolution systems in operation. To do so was beyond the scale of and resources available to this project;
- (ii) restrictions upon access to documentation in case study illustrations, particularly legal evidence and government documentation. There is no Freedom of Information legislation in Tasmania. This has placed undue reliance on the observation of dynamics, processes and procedures, and on discussions with disputants and others (as indicated in Section 2. 4);
- (iii) no survey of the attitudes, needs and desired outcomes of parties in disputes could be undertaken;
- (iv) no comprehensive or statistical analysis of all the disputes in each jurisdiction exists, nor was there the means to carry out this task in the context of this project; and
- (v) no follow-up evaluation of the effectiveness of the outcomes of environmental dispute resolution processes was possible, although a longitudinal study would certainly be valuable.

These limitations notwithstanding, it is considered that this study breaks new ground in the analysis of environmental dispute resolution in Tasmania and in the evaluation of the potential for environmental mediation.

CHAPTER 2

AN OVERVIEW OF ENVIRONMENTAL DECISION MAKING

2. 1 Introduction

Environmental disputes are essentially conflicts between competing interests over the allocation and use of resources.

To allocate or not to allocate, and if so, what? To whom? How? For what purpose(s) and at what cost? These are the key questions underlying environmental decision making and the way in which they are handled may provoke or resolve an environmental dispute.

The aim of this chapter is to give an overview of the legal and administrative context in which environmental management decisions are made and disputes are addressed. It is not intended as an in-depth treatise on environmental law concepts and practices nor as an expert appraisal of environmental management practices . Rather, the intention is as stated, to provide a contextual backdrop against which to undertake a more detailed examination of existing and potential environmental dispute resolution practices and options in subsequent chapters.

The definition of "environment" is in itself no easy matter. It depends on whether it is defined by a physical or social scientist, a lawyer or economist, a developer or politician. The definition will reflect the interests of the person by whom it is defined .

The common thread is that all refer, to a greater or lesser degree, to natural and man-made resources and the interaction and inter-relationship of humans with these, be they living or non-living. The focus of the definition can be anthropocentric or ecocentric .

Environmental law and administrative decision-making are traditionally anthropocentric in orientation . There are, however, critics of this approach . Boer (1984) argues for the incorporation of a new ecological ethic into the current legal and administrative framework to more adequately encompass and develop the notion of "social ecology", the interaction between humans and other life-forms and non living elements of the earth . Birkeland-Corro (1988) also advocates a new ecological ethic to underpin environmental law and planning systems and so more adequately reflect the true nature of environmental problems .

In fact the definition of "environment" as embodied in various pieces of legislation varies from the narrow definition in the *Commonwealth Environment Protection (Impact of Proposals) Act 1974, S.3*: "[environment] includes all aspects of the surroundings of man, whether affecting him as an individual or in his social groupings"; to the broad definition in the *Western Australian Environmental Protection Act (1986)*: "[environment] means living things, their physical, biological, and social surroundings, and interactions between all of these", to the somewhat prosaic definition in the *Tasmanian Environment Protection Act (1973) S.2*, which merely refers to "the land, water, and atmosphere of the earth". For the purpose of this study, "environment" will be used in the broad context to refer to the interaction and interrelationship of humans with both living and non-living resources. It will retain an anthropocentric focus whilst not disputing the validity of an ecocentric perspective.

Environmental decision-making systems are an amalgam of a judicial framework and administrative and policy decision making machinery, usually containing an inbuilt facility for judicial or quasi-judicial review of decisions, such as an objection and appeal process . Both systems must be taken into account in any overview of environmental decision-making. (On systems see Appendix I).

Environmental disputes are a manifestation of systems failure or dysfunction. Review and appeals systems can be considered to be fail-safe mechanisms to minimize the possibility of negative outcomes in the event of a systems malfunction such as a dispute .

However, environmental disputes - the issues, dynamics, processes, and outcomes - cannot be considered in isolation from the institutional framework in which environmental dispute resolution is effected.

The institutional framework determines the manner and extent to which issues in dispute are identified; for example, only those issues that come within the bounds of the prevailing legislation can be addressed by the designated statutory authority responsible for the implementation of that legislation. The institutional framework also determines the processes, be they judicial or administrative, by which disputes are resolved, and their ability to deal with substantive as well as procedural issues. Inability to resolve substantive issues often results in outcomes that are not satisfactory to the parties. This being so, the unresolved issues often re-emerge in another form or in another jurisdiction; for example, a dispute over licensing conditions may re-emerge as a zoning issue (Sandford 1988).

2.2 The judicial system

The major body of legal literature on environmental disputes has two streams, natural resource law and environmental law. This division reflects past controversy as to whether "natural resource law" with its primary concern for the development and exploitation of natural resources can properly be considered as environmental law, given that proponents of environmental law view conservation and protection as the primary foci of environmental law.

Bates (1987: 4) proposes an all encompassing definition of environmental law:

any regulation of statute law or common law which affects the natural environment per se; which declares the rights and duties of any person to take action to develop or protect the environment; or which might affect the scenic, historical, artistic or cultural beauty or appreciation of human efforts to harmonise the built and natural environments.

Fisher (1980: 8) adopted the following view of environmental law:

to include the protection of the environment, the integration of the environmental dimension into the decision-making process and the use and exploitation of resources as the background against which other aspects of environmental law operate.

Both definitions are indicative of the difficulty of encapsulating a

comprehensive (rather than a linear) concept of "environment" which reflects the holistic and interdisciplinary origins of environmental issues and environmental law.

In a later publication Fisher (1987) appears to merge natural resources and environmental concepts. His use of "natural resources" includes decisions relating to the use, development, and conservation of the physical resources of Australia . So, his structural model of natural resources law can be readily applied to an analysis of environmental law. Natural resource law is inevitably environmentally-relevant as it has an environmental impact. On these grounds, this author has no difficulty in encompassing natural resources law as part of environmental law.

According to Bates (1987: 5), environmental law is almost entirely a product of legislation . That is, its sources of authority and responsibility are derived from statute law or legislation supported by common law. In essence, the scope and context of environmental law and its legislative products are concerned with public law, issues of public concern and protection of the public interest . On the other hand, common law, the traditional body of the law, is concerned with the protection of private, individual rights and relies on the doctrine of precedent. Some resources such as water, minerals, and energy do not fit neatly into either public or private sector and tend to have elements of both. In these situations, both environmental law and common law are often used .

Common law, as well as defining the nature and extent of an individual's property rights, makes provision for the protection of these rights by an action in nuisance or trespass. Nuisance or trespass are the "grounds" on which individuals may take action to seek protection of their property rights and they allow for remedies of an injunction or damages. Both remedies have been awarded in environmental disputes.

Injunctions to stop actions about which there is a complaint are the more common. They can also be used as a delaying tactic. Environmental damage is more difficult to measure and to quantify in monetary terms, as in the case of damage caused by toxic emissions and the estimation of the cost of future loss. For example, it is difficult to estimate economic loss to the agricultural industry of the impact of a toxic or pesticide buildup in the food chain. Another example is the difficulty in estimating pain and suffering and future loss of earning capacity as the result of exposure

to occupational carcinogens which are typified by a gradual onset of symptoms often over a period of years, Heller (1981).

The "revolution" of common law around individual property rights, rights of ownership, or an interest over, or in land, is historically based. Common law evolved from eleventh century British law, a time of primitive technology by present day standards, abundant natural resources and minimal competition for those resources. In the twentieth century, common law is too narrow and lacks the flexibility to deal with technological advances which are expanding rapidly, which pose unprecedented threats to the environment and which transcend the boundaries of property rights (Ozawa and Susskind 1985).

The inability of the common law to meet the challenges of advanced technology and its effects over large areas of land, particularly public land, has meant that the major momentum in environmental matters and environmental law has come from governments and legislation rather than from the common law (Bates 1987: 36).

Statute law or legislation is an instrument of government. It is therefore unavoidable that legislation will reflect the political imperatives and the perceived electoral issues and pressures of the time. Hence the multitude of amendments as issues and governments change. Nevertheless, legislation tends to be able to respond more readily and rapidly to changing economic, political and social demands and realities than does the common law.

Statute has frequently intervened to distort the common law approach (Fisher 1987), for example, to bypass common law as a source of legal authority, as with so-called "Fast Track" legislation. Furthermore, Australia is a federation, and as such, there are two sources of legislative powers in each state - the State and the Commonwealth. While responsibility for environmental matters is vested in the states, the Commonwealth also possesses powers which it may validly exercise for environmental reasons. It has enacted national environmental legislation, the Commonwealth *Environment Protection (Impact of Proposals) Act 1974*.

In addition to its direct powers, the Commonwealth also exercised indirect powers, for example, those relating to taxation, corporate affairs, funding,

and Local government powers which are derived from state government powers.

The oft cited Tasmanian Dams Case *Commonwealth v Tasmania* (1983) 4ALR 625 is perhaps the most publicised demonstration of the extent of Commonwealth power in several areas, those of external affairs, corporations, and the people of any race power having been used to sanction Commonwealth intervention in an environmental dispute.

The "Dams' issue" was also the source of one of the most bitterly contested, divisive and costly environmental disputes Australia has ever seen. The scars are still evident in Tasmanian society today, witness to the inability of the legal system to address and resolve the substantive issues of the dispute (Herr & Davis 1982).

It is in the exercise of Commonwealth-State environmental responsibilities and the administration and implementation of environmental management policies that the macro-legal system is seen in operation. The interrelationship and interaction of a multitude of government departments and statutory authorities at federal, state, and local levels - ministerial councils, advisory bodies, federal and state Cabinets, and Parliament - comprise the macro-legal system.

As Fisher (1987: 1) states, the natural resources legal system Australia is largely institutional in character and structural in form.

He argues that the current structure of natural resources/environmental law in Australia has 2 parts - the traditional micro-legal system and the emerging macro-legal system. The two systems are interdependent and with the administrative decision-making apparatus make up the structure of a natural resources legal system.

The micro-legal system is predominantly jurisdictional, administrative, and procedural. It prescribes the existence of rights of sovereignty, rules of titular ownership, the requirements for the exercise of statutory and common law powers and the standards required for the exercise of these powers (Fisher 1987). The micro-legal system thus portrays the popular perception of environmental law as being preoccupied with due process and procedure rather than with substantive issues.

The macro-legal system is the "broad-brush" perspective, being concerned with policies, aims, objectives, or purposes of the decision-making process whether legislative, executive, proprietary, or contractual.

Both systems presuppose the capacity to make legally binding decisions within their relevant areas of jurisdiction . In the microlegal system, the ultimate decision is liable to judicial review in court. Decisions of the macrolegal system, on the other hand, may not necessarily always be enforceable .

This plethora of legal and administrative bodies at federal level has its mirror-image in each state. There is, however, a notable lack of national consistency in the way in which each state has sought to develop its own environmental management regime.

In the macro-legal arena of environmental policy implementation, the potentially problematic, even conflictual, relationship of law to administration becomes apparent . The objectives and purposes of the decision-making process may be explicit, or, more often, implicit in the legislation (Fisher 1987). In the judicial context it is usually limited to indicating the preferred interpretation of the legislation. Statements or implications of purpose in legislation are increasingly a more formal part of the decision-making process. They are intended as a guide to the administration of the legislation and may not be enforceable, nor is legal remedy likely should an administrator choose to ignore these statutory indicators (Fisher 1987).

It is concerns such as this that prompt the legal profession to advocate the need for retention of judicial review of administrative decision-making . The profession contends that the judicial system, and in particular the courts, is removed from the political influence which may affect the objectivity of administrative decision makers in the public sector . For this reason, it has sought an extension of the judicial role in the macro-legal system.

As Lake (1980: 4) points out, although environmental policy implementation has frequently resulted in administrative breakdown, and judicial intervention, the transfer of the decision making process from the operating agency to the legal profession has meant that lawyers, intent on the development of precedents and procedural regularity, have

failed to consider the institutional impact of expanded judicial roles on the quality of decisions and on the authority of administrators.

Environmental management, including policy implementation, is the central concept of the macro-legal system. Management is dynamic rather than static . It must be able to change as issues, demands, and priorities change. It has a flexibility and a capacity for movement not available to the law . In fact, "management ... has become the principle means of settling disputes arising from the consequences of the fragmentation of rights of property into a series of potentially conflicting interests" (Fisher 1987: 45).

2.3 The administrative system

In contrast to the judicial system with its clearly defined concepts and principles of power, authority, rights, obligations, and process, the administrative system appears relatively ill defined, an amorphous body of policy, objectives, priorities, management plans, and discretionary decision-making . Unlike the judicial system, the administrative system, located in public sector bureaucracy, is interwoven with the political decision making process, structurally and functionally .

Structurally, the public service is a product of the Westminster system of government. It carries out the directions of the government of the day. Ministers determine policy which is implemented by public servants who are held to be politically impartial. Ministers are responsible to Parliament for the policies and actions of their departments and the ultimate decision-making power rests with the Prime Minister or the Premier and Cabinet depending on whether the legislature is federal or state (Davis *et. al.* 1988).

Within departments and public agencies there are structural and functional divisions, decision making power being assigned according to the authority and functions of the position.

Environmental management and its administrative systems demonstrate a number of characteristics common to most public administration, namely:

- (i) policy formulation and implementation;
- (ii) identification and protection of the public interest; and
- (iii) discretionary decision making.

It may also display characteristics that differentiate it from the more usual forms of public administration:

- (iv) resource based structural and functional differentiation of administration; and
- (v) interdisciplinary decision making.

(i) Policy formulation and implementation

Policy, in this case environmental policy, is the core of the administrative decision-making process. It is a statement of purpose or of the intent of the government. It may be explicit or implicit. It may be contained in the legislation or in guidelines, policy statements or position papers. In any event it is intended as a guide for legislation.

The theory is straightforward, the practice less so (Frazer 1986). In practice there is no such phenomenon as a national (or even a state) public policy process, nor can it be generalised across departments or government bodies, let alone between levels of government, local, state, or federal, although there have been some efforts to do so:

Although some attempts have been made within states to coordinate environmental policy through ministries of conservation or land-use advisory councils of civil services, the standard of performance does not seem significantly different from those jurisdictions where functional fragmentation occurs (Davis 1985: 3).

Federal and State bureaucracies develop environmental policies using a variety of strategies. There is no single procedure for making policy. They get experts to write policy papers; modify existing programs; and/or request input from academics, interest groups, industry and other government agencies (Davis et al. 1986: 122). They also react to political stimuli:

Major public policies are the outcome of a complex game of negotiations, of expert opinion weighted against the electoral imperative of competing interests seeking to advance self-interest through a favourable choice (Davis *et.al.* 1988: 123).

A Cabinet government promotes not just argument or debate but often barely disguised conflict as competing bureaucratic and ministerial interests and priorities jostle for the Treasury dollar at the expense of integrated environmental management in the public interest.

(ii) Protection of the public interest

Identification and protection of the public interest is a central function of the administrative system, protection of the private interest being a function of the legal system (Fisher 1987).

Environmental law is primarily public law, but the development or management of a resource usually involves the exercise of property rights. This is where the functions of the legal and administrative systems merge. For example, the development or management of a resource may impinge on the property rights of another person and the exercise of property rights may be inconsistent with the public interest manifested through statements of public policy or governmental objective.

This is most readily demonstrated at a state level where the majority of environmental policies are formulated and decisions made. The evolution of the Environmental Impact Assessment (EIA) process for all its faults is generally accepted as an example of the establishment of an administrative decision-making process to identify and protect the public interest vis-a-vis resource development (Fowler 1982).

One of the difficulties confronting the protection of the public interest by an administrative decision-making process, is that, although disincentives for breach of policy may be stated (for example, in policies, guidelines, and management plans), this does not mean that they are legally enforceable and they may thus be challenged or even ignored.

This is where Fisher's (1987) identification of regulatory, interventionist and directory functions of resource authorities comes into its own. Fisher contends that these functions are common to all jurisdictions to a greater

or lesser degree, depending on the purpose of the department or statutory authority .

The regulatory approach is seen in environmental and pollution control where protection of the public interest lies with the authority in which is also vested discretionary power of control as identified in legislation or policies and which are exercised by reference to criteria designed to protect the public interest. This regulatory function effectively operates to limit the range of decisions open to the owner of the resource.

The second function is that of intervention. It applies to resources vested in the private sector and is the mandate whereby a public authority may require a private person or institution to undertake designated activities. It becomes complicated where functions of ownership and management are divided between private and public sector as, for example, in the case of mining on Crown Land.

The third function of environmental administration is the directory approach which relates to resources vested in public authorities. It indicates the direction in which public authorities are expected to exercise their powers in the public interest.

It is likely that some public authorities have a combination of these functions. Some are explicitly stated in legislation, regulations, and policies, while others are the subject of discretionary decision-making.

(iii) Discretionary decision-making

Administrative decision making involves choices; choices which can be made at a number of levels in different agencies. As Davis *et. al.* (1988) note, there is inevitably discretion in the decision-process.

Departments and statutory authorities negotiate policy with the Minister and Cabinet, with broad guidelines being laid down by Cabinet . However, departments decide for themselves the details and process of policy implementation. There is usually considerable latitude here for discretionary decision-making, including the determination of priorities and the allocation of resources.

Where several jurisdictions and agencies are involved, as in many

environmental issues, the decisions of a department may be challenged by other departments and by Cabinet. In these situations Cabinet may decide.

In practice, government agencies have substantial discretion to make decisions about the allocation and management of resources. It is the extent and implications of those discretionary powers that cause concern among those outside the bureaucracy including the legal profession, public interest groups, and industry, many of whom support the need for a mechanism to review administrative decisions (procedures for appeals against administrative discretion are considered later in this thesis).

In actuality it is not just the use of discretion in decision making that is in question, but the possibility of political influence and possibly direct intervention in the process, so that the outcome is tailored to political needs and priorities rather than to the public interest per se. As critics of "unbridled discretion" are anxious to note, public servants also have a vested interest in outcomes that will enhance their positions and opportunities in the bureaucracy and not alienate their political masters .

So it seems that discretion may be the better part of valour, but only in so far as it does not jeopardise the status quo of the public service.

(iv) Functional differentiation

Functional differentiation typifies environmental management and is evident in the literature where most environmental law is developed around the nature of the relevant resource - minerals, energy, forestry, fisheries, and land-use planning. It is further evident in the functional approach at state level, the state being the level of jurisdiction at which most land use and environmental management policies are made. For example, resource legislation reflects the divisions in the administrative structure, which in turn depend upon the separation of resources into various elements: land, minerals, forests, fisheries, and the like (Bates 1987).

There is, however, a significant overlap of jurisdictions in the management of some resources and/or issues. This raises questions of which legislation and government authority has priority. Sometimes exclusive or priority control is identified. More often than not, it is not, resulting in

interdepartmental competition for resource management or control.

(v) Interdisciplinary decision-making

It is the multidisciplinary nature of environmental management that is both its greatest strength and its greatest challenge; as Bates (1987: 53) notes, "the world of environmental management and protection is a multidisciplinary one".

Bates might also have added that the law is but one of the disciplines involved. In fact the roles of other professional disciplines, industry, and public interest groups, have increased in significance in recent years as environmental issues gain in stature on political, economic and social agendas across the country and particularly in Tasmania (Hay 1987).

This multidisciplinary nature is most apparent in the EIA process where interdisciplinary analysis of issues is required. As Blumm (1988) notes, generalising from the record of operation of the National Environment Policy Act (NEPA) in the USA, the roles of certain professional disciplines in the government, for example, planners and biologists, have risen in prominence through the requirement for interdisciplinary analysis. The incorporation of social and economic impact analysis as discrete components of an Environmental Impact Statement (EIS) will also serve to raise the profile of social scientists and economists.

Social Impact Assessment (SIA) is a fairly new but rapidly growing field in Australia as developers and governments come to appreciate that, although there may be economic benefits from resource development, social impacts can "make or break" a project. Negative social impacts of a development can have adverse electoral ramifications.

An interdisciplinary approach to administrative decision-making is not easy, one of the reasons being that different values, objectives, and concepts of environmental management must be taken into account. This is apparent in the literature, the bulk of literature on environmental decision-making having its origins in planning and land-use administration and more recently environmental law.

Physical scientists are represented mainly in discussions of the merits of scientific methodologies, the validity of scientific and technical data and

the use of expert witnesses in development disputes.

Social scientists are poorly represented, especially in Australia. This is perhaps surprising given their prominence in areas of social reform, and civil and welfare rights in the late 1960s to mid 1970s. It appears that social scientists have failed to grasp the importance and magnitude of the social implications of environmental issues.

2.4 Conclusion

Environmental decision making is a composite of a legal system with clearly defined, even inflexible powers, processes, and procedures, and an administrative system of discretionary decision making in the public interest by functionally different authorities, its policies, processes, and procedures being as variable as the functions of the public authorities. This combination of legal definition and administrative discretion in environmental decision-making can be summed up in the author's formula

$$\text{Definition} + \text{Discretion} = \text{Decision}$$

No decision-making process is infallible. While flexibility of processes and procedures enables the administrative system to more readily and more rapidly adapt to technological advances and to anticipate environmental impacts, it remains susceptible to political, economic, and social pressures .

On the other hand, the law is restrained, if not inhibited, by its lack of flexibility in a rapidly changing world. It has to battle to establish precedents or wait for precedents to be established, either way a lengthy process. The law lacks the capacity to accommodate rapid change and can only deal in the present, not in prospect . Hence decisions made may be contextually inadequate or inappropriate as is often the case in wide ranging, environmental issues which require a more integrated approach to decision-making .

Neither decision making system is adequate in itself and the probability of error and omission is present in each. Provisions for review of decisions, both legal and administrative, are essential as a quality control of environmental decision-making. The review process may be judicial or

administrative, a court in the case of the former, an administrative tribunal in the case of the latter, or a two-tiered process - a combination of both.

These are the means by which environmental decision-making is safeguarded, and resource allocation and disputes addressed. There are comparable systems in most democratic countries, including Canada and the USA, and this is evident from a review of the literature and history of public disputes and environmental mediation in the following chapter.

CHAPTER 3

PUBLIC DISPUTES AND ENVIRONMENTAL MEDIATION IN HISTORY, IN THEORY AND IN PRACTICE

3.1 Introduction

The presence of conflict in a situation is not necessarily a negative phenomenon. If viewed positively, it can be an opportunity for growth and for the exploration of innovative solutions to problems of competing goals, whether they be actual or perceived (Moore 1987: 18). It is the negative impacts of unmanaged conflict that are dysfunctional rather than the conflict itself. Productive conflict resolution depends on the abilities of the participants to devise efficient and co-operative problem solving procedures and to be prepared to work together to develop mutually acceptable solutions; that is the key to successful conflict and dispute resolution (Moore 1987).

Gulliver (quoted in Moore 1987: 4) notes that a disagreement or conflict becomes a dispute:

only when the two parties are unable and/or unwilling to resolve their disagreement, that is when one or both are not prepared to accept the status quo (should that any longer be a possibility) or to accede to the demand or denial of demand by the other. A dispute is precipitated by a crisis in a relationship.

Folberg and Taylor (1984) also distinguish between a manifest dispute to be resolved and the underlying conflict that may remain, perhaps in a more manageable form. Both dispute resolution and conflict management are complementary and realistic goals of mediation.

A level of managed conflict underpins and maintains the profile and momentum of most environmental disputes, fuelled by differences in the values, attitudes, philosophies and objectives of the parties in conflict.

This managed conflict becomes a dispute when it is triggered by a particular event or decision such as a notice of intent to develop or a development proposal. It is at this point of conflict escalation that parties become disputants and must then seek ways to resolve the dispute and contain the conflict at a manageable level.

Environmental disputes are public disputes; that is, they focus on public issues and the public interest rather than on private issues. The disputes profiled in Chapter 4 are examples of public disputes. Forestry, mining, fisheries, land-use planning and environmental protection are all public issues, being resources that are managed by government in the public rather than in the private interest.

What distinguishes public disputes from private disputes is that they are controversies that affect members of the public beyond the primary negotiators - they involve one or more levels of government often as a party and usually as a decision maker (Carpenter and Kennedy 1988: 4). Environmental disputes are therefore public disputes and the terms are often used interchangeably in environmental dispute resolution literature.

3.2 Public disputes defined

Public disputes are important for several reasons:

- (i) they represent important public choices about major economic, social and environmental issues;
- (ii) they are time consuming and expensive to litigate;
- (iii) if they are not fully resolved they often re-emerge in other forms as new litigation, or new legislative, regulatory or administrative battles (Adler 1987: 1).

Public disputes also attract considerable attention - witness the forestry disputes of the Tasmanian Southern and Lemonthyme forests, the proposed construction of a pulpmill at Wesley Vale, and the lower profile, but equally divisive disputes described in the next chapter. As Susskind and Cruikshank (1987) comment, all these controversies fall into a category of public disputes called distributional disputes, which differ markedly

from a second category of public disputes which centre primarily on the definition of constitutional or legal rights. According to Susskind and Cruikshank (1987), distributional disputes focus on the allocation of lands, resource use, the setting of standards or the siting of facilities, whereas constitutional disputes such as those concerned with the freedom of information, homosexual rights and affirmative action hinge primarily on court interpretations of constitutionally guaranteed rights.

Susskind and Cruikshank (1987) and Adler (1987) argue that constitutional and legal rights are not negotiable and are best resolved by the judicial system. Adler notes that most parties involved in constitutional or rights disputes usually prefer to use the courts to establish legal precedence and so promote changes in the law.

However, when the focus is on the distribution of tangible gains and losses, and not on whether something is legal or illegal, we are firmly convinced that consensus building strategies can help (Susskind and Cruikshank 1987: 17).

The distinction between these two categories of disputes may be clear or they may become entangled, and final distributional decisions are, in most instances, postponed until the questions of fundamental rights can be resolved. Then the distributional dispute can begin in earnest (Susskind and Cruikshank 1987: 19).

Public distributional disputes have historically been resolved by political compromise as disputants concentrate on winning. The classical techniques of political bargaining include coalition building, manipulation of the mass media to alter public opinion, referenda, promises of political or financial support and vote exchanges (Susskind and Cruikshank 1987). The disadvantage of these strategies is that the results are often barely acceptable to any of the parties, stalemates and deadlocks are frequent, the substantial issues often remain unresolved, and conflict remains at a barely manageable level, the "losing" side feeling cheated.

In place of political compromise, Susskind and Cruikshank (1987) argue for voluntary agreements that offer the wisest, fairest, most efficient, and most stable outcomes possible.

Ideally, distributional disputes should be settled by the parties themselves, that is using unassisted or private negotiation (Susskind and Cruikshank

1987: 33). However, as many distributional disputes are multiparty and multi-issue disputes, with the parties unable to resolve their differences, assisted negotiation is often necessary.

If that is the case, then the disputing parties have only two choices: they can resort to the conventional, legislative, administrative or judicial means of resolving distributional disputes, or they can seek the help of a nonpartisan intermediary - a facilitator, mediator or arbitrator - and engage in assisted negotiation (Susskind and Cruikshank 1987: 137).

3.3 Environmental Mediation Defined

Parties involved in disputes have a variety of choices concerning the means chosen to resolve their differences (Moore 1987). These choices of dispute resolution processes can be placed on a continuum from private and voluntary to public and compulsory. The range of choices reflects the diversity and complexity of dispute resolution options available and includes a category of processes known as alternative dispute resolution (ADR), that is, processes that provide a non-adversarial alternative to litigation and adjudication in the resolution of disputes: "it is the use of an experienced and well qualified third party that generally establishes alternative dispute resolution (ADR)" (Newton 1989: 2).

ADR processes are readily applicable to EDR. However they have yet to be used in environmental dispute resolution in Tasmania, and to the best of the author's knowledge, they have not been used to resolve environmental/ public disputes in any other Australian state. All the ADR options outlined below are practiced in the USA and Canada and many are now available to disputants in New South Wales and Victoria (and, to a lesser extent, in other states) where ADR has become recognized as an effective alternative to litigation in the resolution of community and commercial disputes (Faulkes 1986; Bryson 1986; David 1988).

The most generally accepted dispute resolution options (including those identified as ADR processes) are negotiation, facilitation, mediation, independent expert appraisal, conciliation, arbitration, adjudication and legislative resolution.

- (i) Negotiation is the process in which parties voluntarily enter into a temporary bargaining relationship to resolve a perceived or actual

conflict of interest in a structured and private dispute resolution process (Moore 1987).

There is no independent third party present.

- (ii) Facilitation is where an impartial third party acts to bring the participants together for the purpose of dispute settlement (Newton 1989). The facilitator provides the parties with a problem-solving process. It is less directive, more informal and generally less appropriate for polarized disputes than is mediation (Moore 1989: 893).

Facilitation is particularly appropriate for scoping issues to be examined in an EIA process and in the development of an EIS. It is also valuable in assisting interorganizational/interagency activities (Moore 1989).

- (iii) Mediation is most commonly used in intractable conflicts where, as Moore (1989) indicates:

- (a) the parties are highly organized and polarised;
- (b) the issues are fairly well defined;
- (c) the parties may have reached a deadlock in negotiations (an "impasse");
- (d) the parties' power has been tested, or the consequences of its future use would be mutually damaging; and
- (e) disputants need more procedural structure or direction from an impartial third party to achieve settlement.

Mediation is variously defined as:

- (a) the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will meet their needs. It is a process that emphasises the

participants' own responsibilities for making decisions that affect their lives (Folberg and Taylor 1984: 7); and

- (b) an extension and elaboration of the negotiation process which involves the intervention of an acceptable, impartial and neutral third party who has no authoritative decision-making power, to assist disputing parties reach a mutually acceptable settlement of issues in the dispute. It is a voluntary decision-making process in which the decision-making power remains in the hands of the people in conflict (Moore 1987: 6).

However mediation is defined, it is characterized as a voluntary and private process whereby an independent third party neutral assists parties to identify, address and resolve the issues in dispute. Mediation is usually initiated when the parties no longer believe that they can handle the conflict on their own and when the only solution appears to be the use of a third party (Moore 1987: 6).

- (iv) Conciliation is never voluntary for the respondent and may or may not be voluntary for the initiating party. The third party neutral, the conciliator, controls the process and the conciliator and the parties control the outcome. The parties are not necessarily in direct contact (David 1986: 51). However David (1988) notes similarities between conciliation and mediation and between conciliation and independent expert appraisal. She suggests (1988: 11) that it would be more appropriate to call conciliation either mediation or expert appraisal to avoid confusion.
- (v) Independent expert appraisal. This is the Australian equivalent of "fact finding" in the USA (David 1988: 10). It is a voluntary and non-binding process whereby a third party neutral is engaged by the parties, is informed of the details of the dispute, and gives an independent expert opinion as to how the dispute can be resolved (Newton 1989).

The process is particularly appropriate for disputes over factual issues (David 1988: 10). It can be combined with other processes such as facilitation and mediation in environmental disputes.

(vi) Administrative or executive dispute resolution: In this process, a third party at some distance from the dispute may make a decision for the parties in dispute. The process may be private, as within a company, or public if it is conducted in a public agency by another administrator. Administrative or executive dispute resolution generally attempts to balance the needs of the entire system and the interests of the individual (Moore 1987: 7).

(vii) Arbitration is a general term for a voluntary process in which the participants request the assistance of an impartial neutral third party to make the decision for them regarding contested issues. The outcome may be binding or advisory (Moore 1987: 7).

People often select arbitration in preference to a judicial resolution as it is more informal, faster, less costly and private, but what distinguishes it from ADR, including mediation and facilitation, is the fact that it is the third party neutral rather than the parties who controls both the process and the outcome; that is, the arbitrator decides the outcome - it is an imposed decision.

(viii) Adjudication is the traditional formal method of dispute resolution by the courts using an adversarial approach (David 1987). It involves the intervention of an institutionalized and socially recognized authority into private dispute resolution. It is a public and compulsory process and a judge (or jury) makes a decision based on case law and legal statutes. The results are binding and enforceable and although the disputants lose control of the outcome, they obtain a decision which reflects socially sanctioned norms (Moore 1987).

Both the Magistrates' and the Mining Warden's Court and administrative appeals tribunals are adjudicators in public disputes in Tasmania.

(ix) Legislative resolution is a public or legal means of resolving a conflict. It is used primarily for large disputes affecting broader populations (as is the case with environmental issues) and the decision is made by voting - a win/lose process. However compromises are usually negotiated in the form of amendments and/or new bills (Moore 1987: 8).

Using this categorization of dispute resolution options, there are thus nine choices of process that parties can make to resolve a particular dispute. These can be grouped into private negotiation, alternative dispute resolution (ADR), and litigation.

ADR is thus a generic term for a collection of processes including facilitation, mediation, and independent expert appraisal which involves the intervention of a third party neutral and which may be used in combination or on its own to resolve disputes ranging from neighbourhood and community justice disputes, to labour, commercial and environmental disputes on a local, state or national level. The essential ingredient is the presence of an independent third party neutral.

EDR is the application of ADR processes to environmental or public disputes. According to Bingham (1986: xv):

the term environmental dispute resolution refers collectively to a variety of approaches that allow the parties to meet face to face to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation. Although there are differences among the approaches, all are voluntary processes that involve some form of consensus building, joint problem solving or negotiation. Litigation, administrative procedures and arbitration are not included in the definition because the objective in those processes is not consensus among the parties.

Bingham also comments that EDR processes can occur with or without the assistance of a mediator.

By Bingham's definition, negotiation, facilitation and mediation are EDR processes but conciliation and arbitration are not for, although they involve third party neutrals, the processes are not voluntary. However Wehr (in Lake 1980: 98) defines conciliation in a manner which seeks to encourage its inclusion as an EDR process. In describing a case study he comments:

The objective of this conciliation effort is to facilitate the articulation of the underlying values of citizens... and to develop a consensus so that political officials can determine if it should be approved, modified or vetoed.

In spite of Wehr's objective of consensus building, the final outcome or decision is made by an external authority, as distinct from EDR where

the parties retain control over both the process and the outcome.

Bacow and Wheeler (1983: 156) make the point that mediators should also not be confused with arbitrators and independent experts. The expert's report is not binding and may be rejected by one or all of the parties, in contrast with a mediated settlement which is agreed to by all the parties, and an arbitrator's decision which is imposed on the parties. Nevertheless, independent expert appraisal is often used to supplement mediation as part of an EDR package.

As with the use of EDR as a collective term, environmental mediation now also tends to be used as a collective term to cover all those ADR options in which an independent, neutral third party - a mediator - is used to assist parties to resolve or settle the issues in public dispute. The key features of mediation, as noted by Folberg and Taylor (1984) and Moore (1987) are:

- (i) the intervention of an independent neutral third party acceptable to the parties;
- (ii) a voluntary consensual process in which the decision making power remains with the parties and is not vested in the mediator;
- (iii) values and principles of the parties rather than those of the mediator are utilized;
- (iv) a short-term process not a long-term intervention;
- (v) a finite process that produces specific outcomes;
- (vi) the outcomes are determined by the parties and not by the mediator;
- (vii) the outcomes must be agreed to but are not binding, although parties can choose to have them enforceable by means of a legal contract or by judicial, legislative or administrative ratification.

The definition of environmental mediation employed in this thesis will embody the principles and processes identified by Moore and Folberg and Taylor and will include both facilitation and mediation as described previously. Environmental mediation may be used as a dispute resolution

process in its own right or it may be used as part of an EDR package which includes other EDR processes such as independent expert appraisal. A mediator often has an educative role to play in this regard so that the parties are aware of the range and the value of the options available. However it remains the decision of the parties to decide which processes they wish to use in order to resolve the dispute in question.

3.4 Environmental mediation - in history

That environmental mediation is a relatively recent innovation in environmental dispute resolution is reflected in the literature. A literature search revealed that all the literature on EDR has been written since the mid 1970s. Environmental dispute resolution as it is specifically understood is therefore less than 20 years old. However mediation as a dispute resolution process is not a new phenomenon, nor is it restricted to western democratic and industrialized countries. There appears to be no comprehensive description or analysis of the development of ADR internationally, information on its history in other than industrialized countries being gleaned from brief references by Moore (1987) and others as indicated.

According to Moore (1987), Latin America and other Hispanic cultures have a history of mediated disputes and in one process (in Mexico) judges assist parties in making consensual decisions (Nader 1969). Mediation is also used in Africa (Gulliver 1971) and in Melanesia (Gulliver 1979).

3.4.1 The People's Republic of China

Mediation has been widely practiced in China and Japan, countries where religion and philosophy place a strong emphasis on social consensus and harmony in human relations, for centuries (Brown 1985). Mediation is currently widely practiced in the People's Republic of China through the People's Conciliation Committees (Ginsberg, in Moore 1989: 26) which operate under the direction and regulations of provincial governments, supported by provincial Bureaux of Justice (Bryson 1986: 96). Bryson further notes (1986: 99) that as the Chinese court system is distinct, inaccessible, and even unpredictable, the mediation system is the primary source of dispute resolution for most people, and the scale of Chinese community mediation is enormous.

3.4.2 Japan

Articles in English on environmental dispute resolution are few, however Japan has a readily identifiable system for resolving environmental pollution disputes under the Law concerning the Settlement of Environmental Pollution Disputes which was enacted in 1970 (Harashina 1988: 31). This system contains out-of-court ways for resolving disputes such as conciliation, mediation, arbitration and ad judication and disputes are settled at the central and local level of organization according to the characteristics of each dispute (Harashina 1988: 31).

Mediation is the most popular procedure in Japan and has been used, for example, to resolve highway artery construction projects in Tokyo. Of 21 cases of mediation in 1984, 19 involved local construction projects, and between 1970 and 1986, 561 of 576 cases were resolved by mediation at the central organization, the Environmental Dispute Coordination Commission. Some 314 of 351 cases were resolved by mediation at the local level, the Prefectural Environmental Pollution Council (Harashina 1988: 31).

3.4.3 USA

In the USA, mediation was used in dispute resolution by Puritans and Quakers and Chinese and Japanese ethnic groups. Until the twentieth century, when it became formally institutionalized and developed as a recognized profession, mediation was performed by people with informal training (Moore 1987: 21).

According to Simkin (1971), the first arena in which mediation was formally institutionalized in the USA was in labor-management relations. In 1913, the U.S. Department of Labor was established and a panel of commissioners of conciliation was appointed to handle conflicts between labor and management (Moore 1987: 21). A Federal Mediation and Conciliation service (FMCS) was established and its work was guided by the Wagner Act and the National Labor Relations Board (Adler 1988). These agencies developed in the context of economic depression and class conflict. After the unions had fought for and achieved important economic and legal victories, collective bargaining as a more stable process of conflict resolution became a reality (Adler 1987: 64).

As Adler (1987: 64) further notes, this pattern of ADR methods gaining in credibility and favour as dispute resolution mechanisms, could also be seen in other sectors, such as the Community Relations Service (CRS) which was established to resolve social and ethnic disputes.

Adler sums up the evolution of ADR legitimacy thus:

the idea of mediating such conflicts probably could not have come into place without the economic, social and political confrontations of the 1960s and, more specifically, without the Civil Rights Act of 1963. Concurrent with the civil rights movement, the 1960s also brought environmental issues to the forefront (1987: 64).

With the creation of the National Environmental Policy Act (NEPA) in 1969 and a national network of enforcement agencies, the stage was theoretically set for an increased number of negotiated rather than litigated settlements between pro and anti-development forces (Adler 1987: 64).

Rivkin (1977) notes that NEPA was also accompanied by a movement towards citizens' environmental activism. It was a movement that created conflict which intensified in the early 1970s. He notes further that 1975 in the USA saw a recession that crippled the building industry and:

adverse economic conditions helped finish the job begun by environmental activists and government imposed moratoria on new construction permits (Rivkin 1977: 3).

This resulted in increased support for developers and industry by workers and the unemployed, which in turn added legitimacy to governmental participation in the negotiation of *ad hoc* solutions for individual projects while a search for more comprehensive guidelines continued (Rivkin 1977: 3).

The earliest experiment with mediation for the resolution of environmental disputes is generally credited to Cormick and McCarthy who successfully pioneered the mediation of a site-specific dispute which became known as the Snoqualmie Dam dispute. Over a period of 11 months in 1973-74, Cormick and McCarthy resolved a long-standing dispute involving government agencies, numerous environmental groups, private citizens and landowners. The dispute had originated in 1968 with a government proposal for large flood control dams on the Snoqualmie River. It escalated and reached an impasse in 1972 as

government agencies delayed making a decision on the project in the face of mounting public opposition. Mediation was initiated in late 1973 and a binding agreement ratified and endorsed by the governor in late 1974 (Lake 1980; Bingham 1986; Amy 1987).

The Snoqualmie Dispute was the genesis of environmental mediation as it is known today.

By 1975, the Conservation Foundation had made dispute resolution a major priority. A Program in Business and the Environment directed at alleviating the polarization that was inhibiting the implementation of a number of environmental laws and programs in the USA, was developed (Reilly 1986; Brunner *et. al.* 1981; Gilbreath 1984). At that stage there was wariness among environmental groups and corporations about mediation, policy dialogues, and related alternatives to the more accustomed avenues of litigation, administrative proceedings and the legislative resolution of conflicts (Reilly 1986). However, by the late 1970s, an increasing number of scholars, environmentalists and developers had begun to explore the possibilities and potential of mediation, and by the 1980s environmental mediation had moved out of the experimental stage and was more institutionalized and professionalized (Amy 1987). From the first mediated dispute in 1973 to mid 1984, mediation had been employed in over 160 environmental disputes in the USA (Bingham 1986: XVII). In fact by 1986 the practice of environmental dispute resolution had grown beyond the resolution of disputes on a case-by-case basis to the institutionalization, by statute, of procedures for resolving environmental disputes through negotiation, mediation and arbitration (Bingham 1986: XVII).

Why this rapid growth in the use of mediation for EDR in the 1980s? According to Bingham (1986), the motivation to find alternatives to traditional dispute resolution processes for controversial environmental issues has come principally from the parties' discontent with traditional adversarial processes:

When decisions in a dispute are seen as choices between winners and losers or when decisions are based on narrow procedural grounds, the interests of one, sometimes all of the parties to the dispute often remain unsatisfied. Instead, environmental disputes usually need solutions that make both good economic and good environmental sense... Innovation has occurred in environmental

dispute resolution processes because of people's desire for more effective and efficient opportunities to find solutions to controversial environmental issues (Bingham 1986: 2).

Time taken, the expense of protracted disputes, the loss of control of the decision making process and the inability to affect the outcome are other reasons given by parties dissatisfied with the traditional adversarial processes (Bingham 1986: 2).

The following quote from Susskind, an eminent proponent of environmental mediation, perhaps best sums up the reasons given in support of mediation:

Mediated negotiation is appealing because it addresses many of the procedural shortcomings of the more traditional approaches to resolving resource allocation conflicts. It allows for more direct involvement of those most affected by decisions than other administrative and legislative processes, it can produce settlements more rapidly and at lower costs than in the courts, and it is more flexible and adaptable to the specific needs of the parties in each unique situation (1984: 2).

The USA is undoubtedly the world leader in the use of mediation to resolve environmental disputes. Whether mediation will increasingly replace litigation as a means of resolving environmental disputes into the 1990s, as its proponents believe, and whether or not it can live up to the high expectations of Susskind remains to be seen. Nevertheless, mediation has already become a significant development in the area of environmental politics (Amy 1987) and thus merits careful analysis.

3.4.4 Canada

Environmental conflict resolution, in the sense the term is understood in the United States, is a relatively novel but emerging idea in Canada,... and despite differences in the political and legal system in Canada, there are enough similarities to make comparisons worthwhile (Sadler 1986: 1).

Canada, unlike the USA, has a Westminster system of government modelled on the British system and a judicial system based on the common law. Jurisdiction over environmental matters in Canada is evenly divided constitutionally between the federal government and the provinces and the framework for environmental law is quite complex with a considerable

degree of overlap and duplication; legislation usually contains provisions for dealing with disputes, and dispute resolution, in the context of environmental issues, has usually been adversarial in nature: "the nature of this system has therefore made it difficult for what may be called participatory decision-making and negotiation" (Grenville-Wood 1987: 180).

Dispute resolution mechanisms have therefore traditionally focused on a regulatory system and its associated administrative tribunals, such as the Environmental Assessment Board of Ontario, which have no counterparts in the USA. In the opinion of Grenville-Wood (1987: 181), this lack of an administrative tribunal form of regulatory system such as exists in the USA means that environmental disputes in that country are more likely to come before the courts. In Canada, however, the resolution of environmental disputes through the use of the common law and the judicial system is cumbersome and rarely used (Grenville-Wood 1987: 181), though Conflict Management Resources considered that:

Recent judicial decisions following the passage of the Canadian Charter of Rights and Freedoms, however, appear to signal movement toward an expanded Role for the judiciary in settling environmental disputes (1986: 4).

According to Sadler (1986) the Canadian EDR scene in the mid-1980s was roughly comparable to the American situation of the late 1970s. However he cautioned that it would be unrealistic to expect the explosive growth that had characterized the 1970s-1980s in the United States, for several reasons:

- (i) Canada's political culture is more conservative;
- (ii) the incorporation of negotiation as an integral part of the decision making process, rather than as an occasional supplement, will require structural change in the system of government which implies a degree of transfer of power; and
- (iii) professional environmental mediators are very scarce in Canada.

In spite of this somewhat pessimistic scenario, mediation to 1986 had been successfully used to resolve several multiparty disputes. It was also being used within judicial and administrative decision making systems.

In 1977, a major hydro electric development was successfully mediated, so ending a bitterly divisive two year dispute between local native Indian communities, a provincial government, the Canadian Federal government and Manitoba Hydro. The mediated agreement is now known as the Northern Flood Agreement.

Another example of mediation in action is the mediation process that is employed by the Ontario Environmental Assessment Board, which is a quasi-judicial administrative hearing process, but which remains largely adversarial in nature. Jeffrey Q.C. (1987) supports the use of mediation/negotiation in appropriate cases as one tool for environmental dispute resolution. He sees it as an adjunct to the existing adjudicative process rather as an alternative to that process (as is practised in the USA). Jeffrey has a number of reservations about the use of mediation and strongly supports retention of the hearing process as the principal model for EDR. This is not, perhaps, surprising, given that Jeffrey is a lawyer and Chairman of the Environmental Assessment Board.

Several other environmental mediations were in progress in Canada in 1986. They were the mediation of a toxic landfill siting which was sponsored by the Ontario Environmental Assessment Board; a facilitated policy development process on the management of toxic chemicals in three provinces; and the mediation of an oil sands mining impact dispute. A recent innovation has been a proposal to develop a system for the resolution of wilderness disputes in British Columbia using an ongoing environmental mediation process conducted under the auspices of a Natural Areas Advisory Council (Rankin 1989).

The administrative tribunal process provides a structure for mediation that is not found in the relatively unstructured regulatory framework in the United States (Grenville-Wood 1987), and it appears that environmental mediation in Canada is likely to continue as a supplement to traditional planning, regulatory and administrative procedures rather than as alternative to them, at least for the foreseeable future (Sadler 1986).

3.4.5 New Zealand

As with Canada and Australia, New Zealand has a Westminster system of government and a judicial system based on British common law. According to Hayward (1988: 3), there is a widespread view that New Zealand's concern for the environment began with proposals in the 1960s to raise the levels of two lakes. While that issue was important, in Hayward's opinion it is the fundamentally different world views and values of the Maoris and the European settlers that are at the core of environmental conflict in New Zealand (Hayward 1988). However, according to Hayward (1988: 12), members of the judiciary are divided on this matter. Turner (1987) considered values to be not judiciable matters while Chilwell (1987) found that Maori spiritual and cultural values could not be excluded from consideration under the Water and Soil Conservation Act (1967). Hayward (1988: 12) concludes that, given the difficulties of adjudicating in such circumstances of fundamental cultural value clash, there is a need for much greater use of non-judicial approaches in the resolution of associated environmental and natural resource use conflicts.

New Zealand is currently engaged in a major reform of its resource management law. This commenced in 1988 and is still proceeding via an extensive public consultation process (New Zealand, Ministry for the Environment 1988).

Public input and submissions to the review have strongly favoured an administrative tribunal rather than a court as the appeal body and have called for greater provision in the law for mediation. In fact this aspect of the appeals proposals drew the most comment, and submissions were overwhelmingly in favour of greater legislative provision for mediation as an effective, time saving and less costly process for environmental dispute resolution (New Zealand, Ministry for the Environment 1989: 28). Other comments supported mediation in scoping, in pre-hearing conferences, and to resolve technical and scientific issues:

The non-adversarial process is particularly important for technically complicated resource development projects, for example, gold and coal mining. For these projects, decisions based on technical information should in most cases, be better than those influenced by legal manipulation in a court room situation (KRTA Ltd 1988: 29).

The Resource Management Law Reform Process has yet to be completed and it remains to be seen what provisions are made for mediation in the new environmental dispute resolution system. There are, nevertheless, definite indications that public preference is for non-judicial determination of environmental disputes and for the majority of natural resource and environmental decision making to be made at a regional level (Hayward 1988).

3.4.6 Australia

In 1982, Faulkes stated that:

the use of community based mediation as an alternative to court action for the resolution of minor civil or criminal disputes is in its infancy in Australia (Faulkes 1982: 1).

If community mediation was in its infancy in 1982, environmental mediation remains foetal in 1989.

It is really only in the 1980s that interest in ADR processes and programs has taken off in Australia (David 1987). The reasons given by David for this upsurge in interest are:

- (i) increased litigation resulting from an increase in legislated rights and courses of action to enforce them; for example, anti-discrimination and environmental protection legislation;
- (ii) decline in informal dispute resolution processes such as public negotiation where third parties came from the community, church or family;
- (iii) advances in technology which have increased the likelihood of harm being traced to its perpetrator; for example, in cases of environmental damage;
- (iv) court delays;
- (v) problems with adjudication including the high cost; time lost through protracted disputes and court delays; the limited remedies available; the depersonalisation of disputes; the adversarial

approach; and the incomprehensibility of proceedings because of the procedural emphasis; and

- (vi) community empowerment resulting from the 1960s movement to return control over disputes and their resolution to the disputants and the community (David 1987: 4-5).

In 1980, the New South Wales Government established a Community Justice Centres Pilot Project to develop community based dispute resolution in New South Wales, and the *Community Justice Centre (Pilot Project) Act 1980* was passed (Faulkes 1982).

In 1984 a Community Mediation Service was established in Adelaide. In 1986 the Victorian Attorney-General announced the government's intention to establish four Neighbourhood Mediation Service Centres in urban and rural Victoria and, in that same year, Western Australia tabled a *Community Justice Centre (Pilot Project) Bill* and established a Family Neighbourhood Mediation Service (Bryson 1986).

Mediation in Australia has focused primarily on the resolution of community and neighbourhood disputes and it was not until the creation of the Australian Commercial Disputes Centre (ACDC) in January 1986 as a private company limited by guarantee, that mediation branched out into the resolution of commercial disputes. ACDC was established by the New South Wales government following a survey of Sydney business people which showed:

that there was very strong demand by the business community for a new option to resolve business disputes particularly as arbitration in Australia had become more expensive than litigation and just as complex (Newton 1989: 8).

Newton, Secretary-General of ACDC, supports the perception that mediation has excellent potential to help resolve environmental disputes. However ACDC has no experience in environmental dispute resolution and although it has considered expanding its operations to include environmental mediation as a commercial operation, it is concerned about the difficulties of determining a fee structure for multiparty disputes in which there is an imbalance of financial resources - as is often the case in- environmental disputes (Sandford 1989b).

From a search of the literature and From regular contact with national and international networks of ADR and EDR colleagues, it appears that mediation of environmental/public disputes in Australia has yet to begin in a formal sense. The only writings on EDR appear to be those of the present author, although there has been much debate and many publications in the areas of land-use planning and environmental law.

In land-use planning, New South Wales established a system of public enquiries on planning and environmental issues in 1979 with the *Environmental Planning and Assessment Act 1979*. This created the statutory office of Commissioners of Inquiry to conduct public enquiries and report their findings to the Minister for Planning and Environment who is responsible for decision making under the Act (Woodward 1984). The procedures adopted are designed "to provide increased opportunity for public involvement and participation in environmental planning and assessment" (S5 (c)).

Although the Commissioners contend that they provide a mediation service, it is not mediation as a voluntary process in which the process and outcomes are controlled by the parties rather than by the mediator. Rather, the Commissioners act as arbitrators in that they make recommendations to the Minister on the decision to be taken.

One trend evident in environmental law in Australia, is the promotion of an ecocentric rather than an anthropocentric approach. From the ranks of Australian environmental law has come a sustained call for a new ethic of "social ecology" rather than the traditional anthropocentric ethic, to underpin environmental law and decision making (Boer 1984), and (Preston 1987) advocates the adoption of ecological criteria as the basis for the development of effective environmental laws.

That environmental law in Australia still favours a traditional adversarial and litigious approach is not surprising, given that even environmental lawyers are the product of adversarially focused training and that most operate from a private enterprise base. In November 1989 at the National Environmental Law (Australia) Conference, Adelaide, Fowler promoted the idea of a national environmental law firm to undertake environmental litigation on behalf of groups/individuals concerned about environmental protection. Such firms are in operation in the USA and are generally funded from philanthropic trusts. This is the model Fowler proposes for

Australia. It does, however, appear to contradict David's assertion (1987: 15) that there is a move away from adjudication in Australia towards ADR. On the other hand, David was referring to the use of ADR for the resolution of community and commercial, rather than environmental, disputes and as has been the pattern in both the USA and Canada, EDR tends to follow ADR.

It seems probable that this will also be the case in Australia as dissatisfaction with adversarial processes, both judicial and administrative, increases. This dissatisfaction has been the precursor of the rise of EDR in the USA and Canada and there is every indication that it is already gaining momentum in Australia. The disputes profiled in the following chapter, and the call for legislative and administrative review of environmental decision making processes in Tasmania by government, industry, members of the judiciary, and the community, support this view.

3.5 Mediation and public disputes - in theory

In order to appreciate why and how mediation is so effective in the resolution of distributional disputes, it is necessary to understand the primary sources of environmental controversies, the characteristics of environmental/public disputes, and the stages in their development. This then places in context the mediation process itself, including the roles of the mediator and the techniques used in environmental mediation:

If there is a secret of environmental mediation - a characteristic that accounts for its ability to generate successful agreements - it lies in the informal nature of the process (Amy 1987: 43).

What is unique about mediation is that it allows for the direct participation of the parties relatively unencumbered by the formal rules of procedure of the courts and administrative processes and, most importantly, it enables parties in an environmental controversy to identify and discuss the real sources of their conflict. Amy comments (1987: 43) that environmental conflicts can never be finally resolved unless the parties have an opportunity to address the real obstacles that lie in the way of their agreement and this is just what traditional adversarial approaches fail to do. For example, litigation rarely addresses the substantive issues in disputes, and courts are inhibited by rules of evidence, restrictive rules of standing and procedural inflexibility. The public hearings and

administrative tribunals are also adversarial and are restricted to addressing the specific legislation or regulation being considered. The following case illustrates this.

In 1986, the Tasmanian Environment Protection Appeal Board (EPAB) handed down its determination on appeals against the decision by the Director of Environmental Control to grant an operating licence to Tasmanian Silicon Smelters Pty Ltd, an issue popularly known as the Electrona case. The EPAB ruled, as a threshold matter, that economic issues generally were not relevant unless impinging upon hardship to any person.

This effectively dismissed the economic impact component of the appeals, although the EPAB subsequently stated:

It is not the duty or function of this Board to enter the field of law reform, but it is obvious to us that the Act needs revision in order that its substantive provisions and procedures are fair to all parties (Tasmania, EPAB 1986: 58).

In short, when environmental disputes are addressed in the context of traditional judicial and administrative institutions they are often framed in a way that inhibits their resolution. In contrast, mediation can allow the parties to more easily address and resolve the issues separating them (Amy 1987).

Mediation is not, however, an automatic process of enlightenment, and the mediator presence is critical in getting the parties to address the real sources of their conflicts. Amy further states that "in long and bitter controversies, parties often come to assume that the dispute is a win/lose one based on irreconcilable differences and interests" (1987: 43). The role of the mediator here is to assist parties to identify the issues and the common ground so that they come to see the problem as less intractable than it first appeared. The marine farm dispute cited in Chapter 4 is such an example, where the problem was based on misinformation and miscommunication but where there was a significant amount of common ground, and so room to negotiate, had mediation been able to proceed.

It is this process of reframing the issues that accounts for the ability of environmental mediation to generate mutually satisfactory agreements to difficult controversies (Amy 1987: 44).

3.5.1 Sources of environmental controversy

There are three (3) primary sources of environmental controversy according to Amy (1987). They are:

- (i) Psychosocial disputes that revolve around negative stereotyping and overheated emotions;
- (ii) Data disputes that centre around scientific arguments; and
- (iii) Interest disputes that involve competing or different interests.

(i) Psychosocial disputes

Values, attitudes and ideology are central to many environmental/public disputes as they underlie the positions adopted by the parties and can act as a barrier to the resolution of the substantive issues and, ultimately, to agreement. Psychosocial factors cannot be addressed by conventional judicial and policy making processes.

The informality of the mediation process provides a constructive alternative forum where these issues can be addressed. At times mediators are required to act in a quasi-therapeutic role in mediations (Amy 1987; Knaster 1989). However, when a mediator becomes aware that it is a personality or psychosocial factor and not a substantive issue that is blocking settlement, she/he is often in a position to recommend a change of negotiator as the representative of a particular party or interest group. "Substituting a different representative can sometimes be the key step towards facilitating an agreement" (Amy 1987: 48).

Another psychosocial barrier is negative stereotyping. Amy (1987: 52) considers that stereotyping and adversarial approaches are mutually supporting, and mediation seeks to break this cycle by undermining these dysfunctional images. Bingham's analysis (1986) of stereotypes in public disputes supports Amy's contention. Bingham noted that the common stereotype of public disputes is that of conflict between developers and environmental or public interest groups. This is an oversimplification. Reality is somewhat different. In fact, in an analysis of mediated site-specific disputes in the USA, Bingham (1986: XIX) identified the parties at the

negotiating table as follows:

- Environmental groups and private companies only (the stereotype) 21% (of all mediated disputes)
- Environmental group plus others 35% (of all mediated disputes)
- Private corporations plus others 34% (of all mediated disputes)
- Federal, State and Local government plus others 82% (of all mediated disputes)

Bingham also noted that many mediated disputes involve only public agencies.

In summary, it is this ability to deal with the psychosocial dimensions of environmental controversies that helps mediators to succeed where traditional approaches have failed (Amy 1987).

(ii) Data disputes

Many environmental disputes revolve around complex scientific and technical issues. Scientific argument is often central to a particular dispute where experts disagree on scientific facts or their interpretation, rather than about the broader issues of the dispute, such as whether or not to construct a facility.

That the adversarial arena is inadequate for dealing with scientific evidence is accepted by Jeffrey (1986). However, he is also of the opinion that in the absence of a viable alternative to fully replace the adversarial legal process, the existing system should be retained. He is not convinced that a system of peer review or ADR would be an improvement. In contrast, Ozawa and Susskind (1985) consider that science-intensive disputes warrant special attention, and that the usual adversarial approach does not provide for an understanding of scientific evidence or the resolution of scientific agreement. These differences in opinion between Jeffrey and Ozawa and Susskind are attributable in part to their differing professional perspectives. Jeffrey is a lawyer (and Chairman of the Ontario Environmental Assessment Board) while Ozawa and Susskind are professional mediators and academics from the Massachusetts Institute of Technology.

Ozawa and Susskind point out that "scientific investigations often produce

varying results depending on the institutional environments in which they are undertaken and the political orientation of the investigators" (1985: 25). They maintain that there are four underlying causes of scientific disagreement: miscommunication, differences in the design of scientific methodology, errors in scientific study, and differences in the interpretation of their findings.

In the opinion of Ozawa and Susskind, mediation offers a greater opportunity than do traditional means for interaction among scientists, affected parties and decision makers, as a range of mediation techniques such as information sharing, joint fact finding, an independent expert, and collaborative model building can be used. Ozawa and Susskind consider that mechanisms that seek to resolve disagreements among scientists by separating them from decision makers and affected interests are undesirable as they place unwarranted power in the hands of scientists (1985: 36). Scientific or data disputes are usually only one component of an environmental issue and scientists must remain accountable to the public.

Mediation helps clarify the power and limitations of scientific analysis by uncovering the basis of the scientific disagreement (Ozawa and Susskind 1985: 36). It also provides a hitherto absent mechanism for ensuring that people have access to accurate information and can share information in a constructive manner.

(iii) Interest Disputes

Interest disputes are the stereotype of environmental disputes; that is, resource exploitation versus resource preservation. Contrary to popular belief such disputes are not intractable and there is often considerable common ground on which the parties can negotiate. Some mediators maintain that there are three kinds of interests present in any environmental controversy - conflicting interests, different interests and common interests (Fisher and Ury, in Amy 1987: 58). Mediators can assist parties to differentiate between their position on a particular issue and their interests. More often than not it is the parties' public positions, rather than their underlying interests, that are in conflict. The private and voluntary nature of environmental mediation affords parties the opportunity to discuss these interests without a public loss of face.

As Amy (1987: 60) notes, in most traditional policy approaches, the focus of discussion is usually on the legal or policy issues and not on the underlying motivations. When the focus is on policies, parties take up positions that are often directly conflictual, so that a focus on policy merely encourages an adversarial atmosphere:

In mediation, the focus can become interests rather than policies. This can introduce greater flexibility and creativity into the process, and this greatly increases the chances of settlement (Amy 1987: 60).

The value and appeal of mediation therefore lies in its ability to achieve breakthroughs in controversial and perhaps protracted disputes. By bringing the parties together in an informal atmosphere, a mediator uses a range of techniques to encourage communication and negotiation in order to examine and reframe the dispute so that a mutually satisfactory settlement is reached.

3.5.2 Characteristics of public disputes

Environmental/public disputes have a number of characteristics which distinguish them from labour-management, community justice and commercial disputes. In fact Carpenter and Kennedy (1988) maintain that public disputes are decidedly different from these disputes in which the adversaries are few and clearly identified. Although no dispute is identical with another, public disputes do have common characteristics. They are:

- (i) A complicated network of interests:
 - (a) new parties emerge as the dispute proceeds;
 - (b) varying levels of expertise;
 - (c) different forms of power;
 - (d) lack of continuing relationships;
 - (e) differing decision making procedures; and
 - (f) unequal accountability.

(ii) Procedures are not standardized:

- (a) no formal guidelines; and
- (b) influence of government rules and regulations.

(iii) A broad range of issues:

- (a) new issues emerge as the dispute proceeds;
- (b) the importance of scientific/technical information; and
- (c) strongly held values.

To discuss each characteristic in turn:

(i) A complicated network of interests

- (a) It is not uncommon for a public dispute to involve 30 or more parties, parties being government agencies, public interest groups, private corporations and industry organisations. It is also not uncommon for new parties to emerge as a dispute progresses. Issues identified initially as either central or peripheral can reverse in importance, bringing with them new parties to the negotiating table who were not originally identified as stakeholders in the dispute.
- (b) Levels of expertise also vary. Public disputes often involve complex problems of scientific/technical information and debate; economic impact; employment issues; complicated legal and regulatory procedures; and not all parties have the same level of expertise in each area. This can result in misinformation, distrust and a perceived imbalance of power.
- (c) Power, real or perceived, can take many forms: information; financial resources; communication, negotiation and media skills; personal networks; and capacity to exert political pressure are all sources of power. Power is not vested solely in government agencies and private corporations or industry groups. As indicated it can take many forms, and a small community group, not restricted by

bureaucratic hierarchies and regulations and with ready access to the media, local networks and politicians, can equalise what was originally perceived to be a power imbalance in a dispute.

- (d) A lack of continuing relationships is another feature of network interests in public disputes (Carpenter and Kennedy 1988: 6). This may be the case in large urban areas but experiences in rural areas and in Tasmania are likely to be different. In these instances the overlap between private and public relationships is marked. More often than not, employment, social, religious, sporting and family networks overlap - if not collide - which then makes the negative impact of a public dispute potentially all the more devastating for both the individual and the local community. This has certainly been the experience in Tasmania.
 - (e) Another network complication is that different organisations have different decision making processes and procedures. Government agencies and corporations have hierarchical decision making structures while many community groups work on a consensus model. This can create tensions among parties to a dispute when quick decisions are required and the consensus representative has to return to his/her group to obtain agreement.
 - (f) Accountability also varies among groups. Government agencies are accountable in the public interest; private sector companies are accountable to their shareholders and have legal obligations. Public interest/community groups are accountable to their members but they are not usually legally bound in the same way as private companies and public agencies.
- (ii) Procedures are not standardised
- (a) As has already been demonstrated, one of the major difficulties with the management of public disputes has been the lack of formal guidelines and mechanisms or structures for resolving disputes. Current structures are adversarially-oriented, inflexible and unable to deal with the complexities or the substantive issues inherent in public disputes.

The multiplicity of jurisdictions and the lack of clarity in relation

to legislative superiority is clearly demonstrated in discussion of the approvals processes in Chapter 4.

- (b) Government agencies are often parties to public disputes and decision makers in the public interest. It is therefore understandable that they may be perceived to have a conflict of interest in disputes in which they are involved. Public suspicions may also be compounded by the limited opportunities for public consultation and the restrictive rules of standing. Governmental dispute resolution capacities are further inhibited by regulations, policies, hierarchical decision-making and, some may say, the politicization of the bureaucracy.

- (iii) A broad range of issues

- (a) Public disputes usually involve a wide range of complex issues (Carpenter and Kennedy 1988), and new issues frequently emerge as a dispute progresses. For example, in the Brunswick-Richmond Powerline dispute, potential health hazards posed by electromagnetic radiation only emerged later in a dispute which was originally focused on technical and engineering solutions to ensure security of electricity supply to an inner urban area of Melbourne (Victoria, Powerline Review Panel 1989).
- (b) Scientific and technical data and information are often very important issues in a public dispute. An understanding of these issues is necessary in order to comprehend the nature and dimensions of the dispute and identify possible settlement alternatives. Scientific information can also constitute an area of dispute within the broader conflict as experts indulge in debate on the relative merits of a particular scientific issue and the viability of alternative approaches to resolution.

Another difficulty here is that little scientific information is presented in a manner that is easily understood by the less technically experienced parties.

- (c) As mentioned previously, values and attitudes are critical variables. Some are explicit and others implicit. They underpin the positions

adopted by the parties and their significance in the final resolution is often underestimated. Parties need not share the same values to resolve a dispute, but they must learn to appreciate that an opposing party's values are important to it and are not necessarily "just tactics".

3.5.3 Public disputes as unmanaged conflict

Identification of the characteristics of and stages in an environmental/public dispute assists in understanding not only the evolution of the dispute, but the role of the mediation process in dispute resolution. Public disputes are dynamic and often volatile. They display common characteristics as described and they also develop sequentially, or in stages. The risk is that a conflict that commences as a resolvable problem, as is the case with all the disputes profiled, can spiral out of control into a destructive and costly dispute in which there are no real winners; what Carpenter and Kennedy (1988) call a spiral of unmanaged conflict.

The Franklin Dam dispute is such an example. The High Court decision in 1983 did not resolve this dispute. It provided a legal decision but did not resolve the substantive issues in the dispute, such as the value of wilderness, which re-emerged in another form as public disputes over the logging of the Southern and Lemonthyme Forests. The author contends that there were no real winners in the Franklin Dam dispute. It created bitter divisions in all strata of Tasmania society and the state still bears the scars today. It was a Pyrrhic victory.

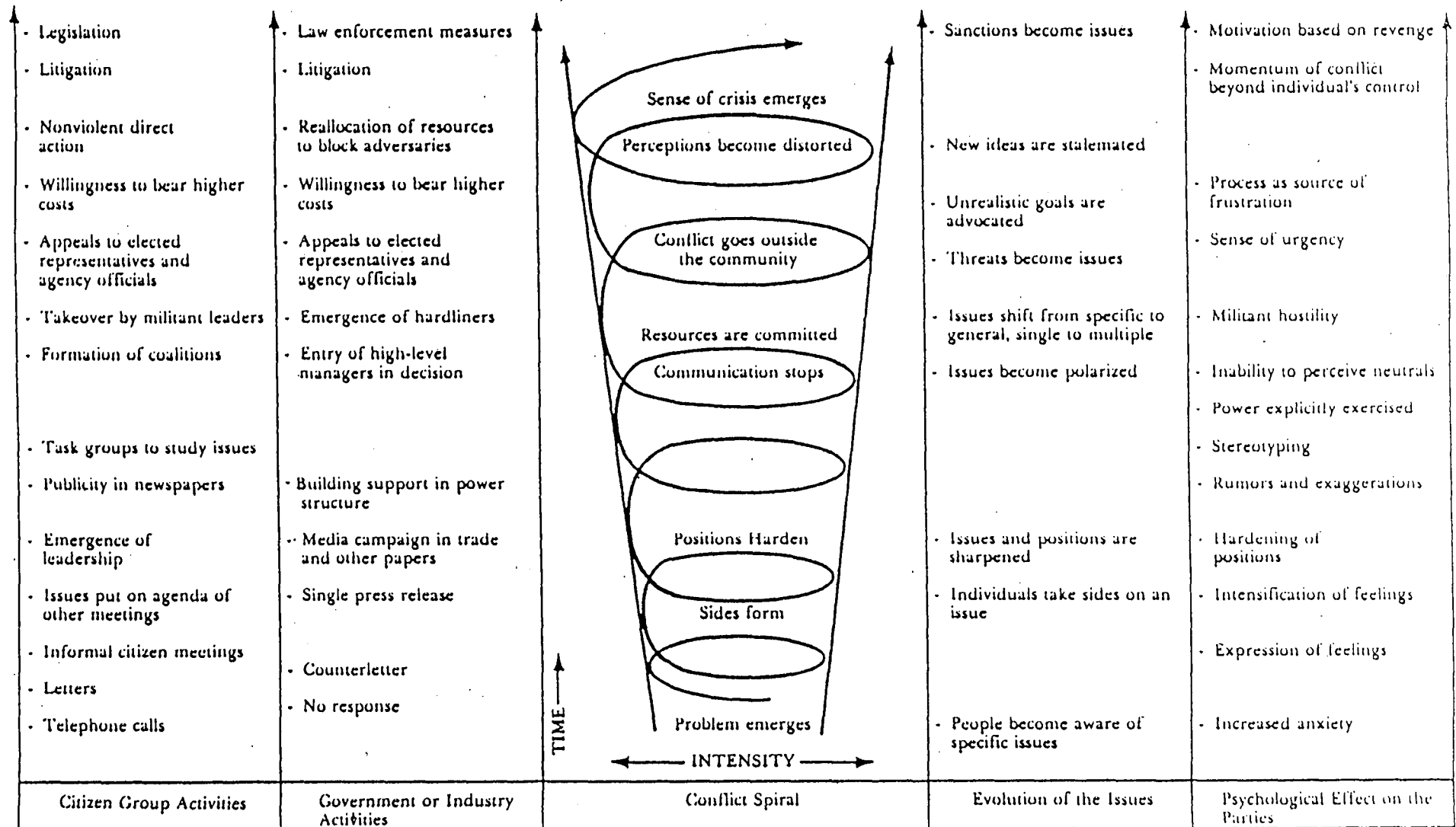
Figure 1 is taken from Carpenter and Kennedy (1988) and effectively illustrates the development of this spiral of unmanaged conflict and the positions of the parties at each stage.

According to Carpenter and Kennedy (1988), this spiral emphasises several important points:

- (i) Unmanaged conflicts become more serious as psychosocial factors tend to escalate in the absence of knowledge about the interests of the other side. Consequently the stakes are progressively raised by all parties, risks and costs increase, and as Carpenter and Kennedy note, complex public disputes can become sinks for resources that the parties never meant to commit (1988: 16).

FIGURE 1

Spiral of Unmanaged Conflict



- (ii) Conflicts that commence as resolvable problems become unmanageable because they are not dealt with in the early stages of their development. There are two points of view on this.

The first considers that the earlier the issues in dispute are identified and addressed, the greater is the likelihood of minimising the destructive impact of polarisation of issues and emotions. The second point of view favours allowing the dispute to reach an impasse so as to provide an additional incentive for the parties to resolve the dispute.

A case can be put for each, but much depends on the dispute. Each dispute must be treated as unique.

- (a) Early intervention

Jay Hair of the National Wildlife Federation, USA, argues (1984) that mediation, if initiated early in a dispute, has the ability to achieve true consensus rather than just a "deal" or "bargain". He also considers that mediation is only effective in the prelitigation phase. The use of mediation in the environmental impact assessment (EIA) process is an example of the value of early intervention.

- (b) Impasse intervention

On the other hand, Adler (1987) emphasises "ripeness" of a case, that is, a case at impasse. The parties cannot proceed further and there is usually a deadline, be it a development plan, or government or court imposed decision.

Proponents of this point of view consider an impasse situation provides an additional incentive to negotiate and is more likely to ensure commitment of the parties to the mediation process.

- (iii) The cost of continuing destructive conflict is enormous. Not only does it include the tangible costs of legal fees, loss of commercial advantage, time out from work, personal time, and resource loss, but, as can be seen in the Tasmanian disputes cited, it includes

incalculable damage to personal and community relationships and professional reputations.

Resources are spent on carrying on the fight rather than solving the problem, and the damage to the community may be irretrievable.

In concluding their expose of the stages in a spiral of unmanaged conflict, Carpenter and Kennedy emphasise that this spiral of confrontation is not inevitable but that it is predictable when nothing is done to manage it (1988: 17). The mediation process provides a mechanism whereby conflict can be managed in the early stages or, alternatively, mediation can be used to resolve a deadlock or impasse and so minimize the costs, tangible and intangible, to all parties.

3.5.4 The mediation process - techniques, mediator roles and functions

Mediators may effectively intervene in environmental conflicts at several points in the early stages of conflict development or at impasse. They may also enter conflicts at a variety of levels according to their degree of organisation and intensity - latent, emerging and manifest (Moore 1987). As described by Moore: "latent conflicts are characterized by underlying tensions that have not fully developed and have not escalated into highly polarized disputes" (1988: 16).

In these cases, the mediator works with the parties to identify the affected interests, educate all parties as to the issues and interests involved, and then assists the parties to develop a problem solving process.

In emerging conflicts, the parties are identified, they acknowledge that there is a dispute, most issues are apparent, but no problem solving mechanism or process exists. Emerging conflicts have the potential for escalation if a resolution procedure is not implemented. In these conflicts, the mediator assists the parties to develop a negotiation process and then to communicate and problem-solve until agreement is reached.

In manifest conflicts, parties are engaged in an ongoing dispute which may have reached an impasse. Mediator intervention is often targeted at reframing the issues and changing the negotiation process to break the

deadlock:

To work effectively on conflicts, the intervenor needs a special road map or "conflict map" of the dispute that details why a conflict is occurring, any barriers to settlement and procedures to manage or resolve the dispute (Moore 1987: 26).

Moore argues that most conflicts have multiple causes and the principal tasks of the mediator and the parties are to identify the central causes of the conflict and take action to address them. As we have seen, there are three primary sources of environmental disputes; psychosocial factors, data/scientific disagreements, and competing or conflicting interests. Mediator intervention is then tailored to address and resolve the causes of the dispute. Figure 2 is taken from Moore (1987) and it illustrates the relationship between causes and interventions in environmental conflicts.

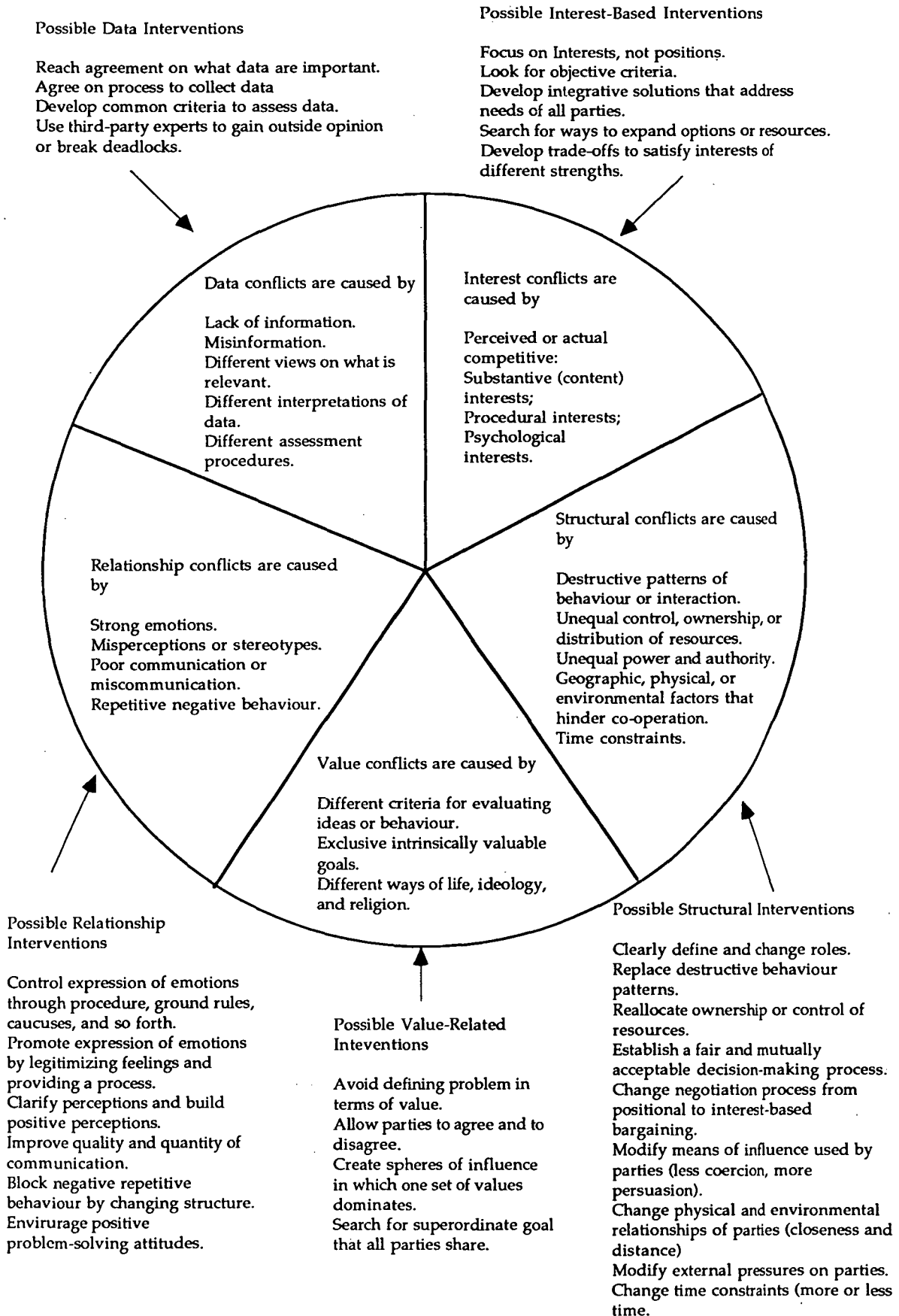
Having determined the causes of the conflict and the nature of the intervention required, the mediator is likely to provide assistance in one or more of three areas (Moore 1989: 894).

- (i) The assessment of the dispute and its readiness (or "ripeness") for resolution, the identification of parties and issues, and the convening of negotiations;
- (ii) the design and implementation of a process for mediated negotiations; and
- (iii) aid in breaking a specific deadlock, the resolution of which will allow the parties to proceed with successful negotiations.

Most mediation practitioners identify stages in the mediation process which correlate with the three areas of assistance proposed by Moore (1989). In 1987, Moore identified twelve stages in the mediation process, Carpenter and Kennedy in 1988 identified three stages, and Knaster (1989b), four stages. In the compression of the mediation process into three or four stages rather than twelve, it is fair to say that each of these stages contains a number of sub-stages or components, which Moore would have classified as discrete stages.

The four stages identified by Knaster (1989b) in the mediation process are:

FIGURE 2
Sphere of Conflict - Causes and Interventions



- (i) assessment of the dispute - identifying the issues, causes and parties;
- (ii) convening - negotiating the process to be used;
- (iii) negotiation - negotiating the issues in the dispute; and
- (iv) implementation - enforcement and evaluation of the agreement.

(i) Assessment

The objective of this preliminary review or exploratory phase is to determine if the parties in dispute are interested in dispute resolution before the mediator proceeds with a full-scale analysis (Wondolleck, in Carpenter and Kennedy 1989: 74). Information is obtained from initial contacts with the parties, usually separately, and From secondary sources such as government reports, media coverage and discussions with others who are knowledgeable about the situation.

If the parties are interested in considering mediation, a formal conflict analysis commences. Information is collected both directly and indirectly From the parties and relevant others and assessed. This conflict analysis forms the basis for the development of a conflict management plan.

Knaster (1989b) considers that there are several key questions to be asked of the parties at this stage:

- of the developer - "What would you be willing to do to modify your operations in order to obtain approval to proceed From your opponents?"
- of the environmentalists - "What would it take for you to agree to let the developer (whom you oppose) proceed with his/her operations?"
- of both parties -
- "What will you win, if you win in court?"
- "What will you win, if you win politically?"

- "How long will it take you to win it?" and
- "Is that better than negotiating?".

Once the parties agree to negotiate, the mediator can then commence designing a mediation process strategy and a program to implement this.

(ii) Convening

In an environmental mediation process the mediator plays the role of convenor by helping the parties to negotiate a framework/process for their deliberations that reflects their needs and relationships (Knaster 1989a: 11). In this way the mediation process provides a mechanism for convening face-to-face interaction.

The first step in this phase is deciding the "shape of the table", that is, who needs to participate. It is essential for the success and stability of the outcome that all stakeholders are represented. It is not feasible to have large numbers of people participating directly in negotiation, and is more manageable if categories of parties such as a local community or public interest group can nominate a representative or spokesperson who has authority to speak and make decisions on their behalf. This authority to make decisions at the negotiating table, without the need to constantly return to seek group endorsement, is important. Although it can pose significant difficulties for community groups which operate on a consensus model, the group must have full confidence in the ability of its representative to negotiate on its behalf. Any group which is considering using mediation, must therefore have resolved this issue prior to the commencement of mediation.

In addition to deciding on who needs to participate, the parties must decide on procedures for exchanging information, establish a timetable, and set goals for the outcome (Knaster 1989a: 11).

Ground rules for the conduct of parties and procedures to be adopted are also agreed upon, as a clearly defined process is essential when dealing with complex and contentious issues. For example, the parties may agree not to speak with the media during the mediation process, not to attack each other's motives or values, and to decide on the types of data to be

obtained and the methods by which that data will be obtained (Carpenter and Kennedy 1989: 131). The parties also need to agree upon ways to handle crises that may arise during the course of negotiation.

It is in this phase that the parties decide on the role of technical/ scientific experts. They may decide to seek independent expert appraisal on technical issues and the mediator can assist the parties in reaching agreement on the source of the expertise.

By designing the negotiation process together and with the assistance of the mediator, the parties build a basis of mutual trust and cooperation. It is a psychological preparation for the negotiation of the substantive issues in the dispute, helps check perceptions of negative stereotypes, and develops a recognition of the legitimacy of the parties and the issues (Moore 1987).

(iii) Negotiation

In this stage, the mediator assists the parties to identify their important issues and to voice their own concerns about the issues, face -to-face and often for the first time. It provides a non-threatening forum for interaction and for each party to review the history and context of the dispute, to reach agreement on a common data base, and to discuss underlying interests rather than the public positions of the parties.

Essentially the mediator helps the parties to talk through the issues and to consider the interrelationship of the issues and how to package these. For example, the parties may identify a hundred or so individual issues which can be effectively packaged into, say, five packages.

During this stage, the mediator usually engages in "shuttle diplomacy", caucusing separately with the parties, interspersed with joint sessions and educating the parties about each other's interests. Mediator observance of and respect for party confidentiality is critical as the basis of trust and credibility.

During this stage any hidden interests of the parties are uncovered in addition to their substantive, procedural and psychological interests (Moore 1987).

The identification of common ground is the most critical step in the balancing of interests. As Knaster (1989a: 11) says: "even though the common ground may be based upon very general premises or ideals, identifying the commonality of interests provides the basis for reaching a negotiated settlement". She gives examples of general principles and goals as being: improving the regional, state or national economy; utilizing national resources in a sustainable manner to benefit all; and preserving unique or valued areas.

The mediator plays an important role in the identification of common ground by steering the parties away from starting positions and demands and towards considering what they can agree upon (Knaster 1989a: 12).

In this negotiation stage, options for settlement are also identified or generated. Parties are often willing to settle some issues but to defer others for further research or for litigation. Settlement options are often better consolidated in a single settlement agreement or package. This ensures that the parties are bound to accept all the options, so that rejection of one option means that the entire package is rejected (Lake 1980). Parties are less likely to jeopardise an entire package than they are a single issue or option. It is more effective and efficient and more likely to produce a stable and lasting outcome. The construction of settlement options or packages is a case of assessing how the parties' interests can be met by the available options, and also an assessment of the costs and benefits of selecting the options (Moore 1987).

Settlement agreements should be written and can take the form of a legal contract or they can be ratified by a court or administrative tribunal (Jeffrey 1987), if the parties so wish.

As Knaster (1989a: 11) notes, the negotiation process is solution oriented. The outcome or solution is designed and agreed to by the parties, rather than being designed by the mediator or an external arbitrator or adjudicator. This being the case, the parties are more likely to support its implementation and so ensure its success, thus avoiding the problem of issues re-emerging at a later date and/or in another form or jurisdiction.

(iv) Implementation

Having reached a final resolution, it is essential that the agreement is

implemented. As Carpenter and Kennedy (1988: 149) state, "the key to carrying out agreements is to include a plan for implementation in the final agreement, not to produce one as an Afterthought".

Procedural steps to operationalize the agreement are usually established (Moore 1987: 248), as is a plan for dealing with setbacks and violations of the agreement. For example, the parties may decide to establish an evaluation and monitoring procedure to ensure that the agreement is carried out, and an independent agency or individual may be appointed to oversee this. An enforcement and commitment mechanism may also be implemented. The monitoring committee may not only take responsibility for identifying and investigating a suspected violation of the agreement, but it may also be given the authority to apply monetary penalties, or remove privileges.

The final step in the implementation process is to determine the future role of the mediator. The parties may decide that they are confident of their ability to implement the agreement and that there is no further role for the mediator. Alternatively they may decide that there is value in a continuing role to assist in handling future difficulties such as breaches of the agreement.

3.5.4.1 The mediator's roles and functions

The roles and functions of a mediator are as diverse as the disputes that she/he mediates. In essence, the mediator has a responsibility for ensuring the success of the conflict management or dispute resolution process, and she/he achieves this objective by carrying out a number of functions, some of which have been outlined in the intervention strategies described in the previous section.

Mediation literature contains numerous "shopping lists" of mediator roles, functions and qualities, both professional and personal. There are, however, significant areas of agreement among the authors which can be summarised using, primarily, information obtained from Stulberg (1981) and Carpenter and Kennedy (1988) in order to provide an overview of the core roles and functions of a mediator of environmental/public disputes. Much EDR literature on the roles and functions of mediators fails to adequately define and to differentiate roles and functions. Stulberg identifies seven roles for mediators. He describes these as "functions",

though they could be more appropriately designated "roles", being the part, or "character", played by the mediator in the context of the dispute. On the other hand Carpenter and Kennedy, in their description of mediator functions (1988: 191), describe the actions or activities undertaken by a mediator as part of his/her "role" as mediator in a dispute. Differentiating thus between Stulberg's mediator "functions" and those of Carpenter and Kennedy, the roles played by mediators in dispute resolution, as described by Stulberg (1981) are:

- (i) Catalyst. The very presence of the mediator affects how the parties interact. Irrespective of whether the mediator maintains a relatively passive procedural role or undertakes a more active role (which could include suggesting substantive resolutions to the dispute as suggested by Susskind 1981), the mere presence of a third party neutral will impact significantly on interaction among the parties and their reactions to one another. Stulberg (1981: 91) contends that, given this situation, a mediator takes on a unique responsibility for the continued integrity of the discussions.
- (ii) Educator. As has been noted, the mediator must educate the parties as to the process, issues, options and value of a mediated settlement. To accomplish this she/he must have a thorough knowledge of the parties' positions, interests and constraints, the dynamics of the controversy, and the political limitations, to enable her/him to explain the reasons for a party's stance or proposal.
- (iii) Translator. As Stulberg succinctly puts it, "the mediator's role is to convey each party's proposals in a language that is both faithful to the desired objectives of the party and formulated to ensure the highest degree of receptivity of the listener" (1981: 92).
- (iv) The presence of the mediator expands the resources available to the parties. The mediator can often facilitate the access by parties to information or data that was previously inaccessible.
- (v) Bearer of bad news. Negotiations are often emotional, do not proceed smoothly, concessions are not easy to make, parties often become defensive if they consider they are under attack and parties frequently reject a proposal in whole or in part (Stulberg 1981: 93).

- (vi) An agent of reality. Parties often become fixed on one solution to a problem and have difficulty acknowledging viable alternatives. The mediator is in the best position to inform the party, as directly and candidly as possible, that its objective is simply not obtainable through those specific negotiations (Stulberg 1981: 93).
- (vii) A scapegoat. Parties often think that they could have done better had they waited longer and demanded more, or that the settlement was forced on them. As Stulberg again says, "in the context of negotiation and mediation, that focus of blame - the scapegoat - can be the mediator" (1981: 94). While being a scapegoat is not a comfortable position, it helps circumvent the parties blaming each other and thus contributing to a further deterioration in the relationship.

While performing in these roles, which are not sequential and which often overlap or change in the course of a mediation, the mediator carries out a range of activities or functions in order to achieve a dispute resolution objective. As with the mediator's roles, her/his functions are undertaken in different combinations and with a variety of emphases, but the techniques are well standardized, and a skilled mediator will perform some or all of the following functions (Carpenter and Kennedy 1988: 191).

- (i) Analyse the conflict. This has already been discussed in detail.
- (ii) Design a strategy. The mediator assists the parties to design a constructive process for the parties to resolve their differences.
- (iii) Establish productive communication. A mediator can set up a system for communication that promotes the productive exchange of information and protects the parties from harm.
- (iv) Manage the Process. A mediator can conduct the entire negotiation program, or a mediator's services may be called upon after the parties' own efforts to negotiate have failed.
- (v) Deal with data. A mediator can work with the parties to determine the nature and type of information required, assist them to collect, organize and analyse the relevant information, and to reach

agreement on what data has relevance (where the parties are in dispute over this).

- (vi) Build and maintain teams within constituencies. Many public disputes involve constituency groups that are neither well organized nor familiar with negotiation procedures (Carpenter and Kennedy 1989: 192). A mediator can help groups with similar interests to form coalitions, select representatives, and select replacement representatives if problems arise. The mediator can also assist in resolving factional disagreements.
- (vii) Provide a neutral ground. A mediator can provide a neutral and private venue for the parties to meet. There is less risk of loss of face and feelings of powerlessness than may be associated with meeting on a party's traditional ground.

In addition to considering the core roles and functions of mediators, most authors place considerable emphasis on the personal attributes or qualities of a mediator. Again, there is general agreement that integrity, confidentiality, patience, a non-judgemental approach, excellent communication skills and professional standing and credibility are paramount. Further qualities identified by Stulberg (1981) as essential are:

- (i) the capacity to appreciate the dynamics of the environment in which the dispute is occurring - the real world of constraints, pressures and frustrations;
- (ii) the mediator must be intelligent, although Stulberg does not necessarily agree with Susskind (in Stulberg 1981: 95) who suggests that a mediator needs to possess some substantive knowledge about the dispute. Stulberg (1981: 94) argues instead that the mediator should possess both process (communication) skills and content knowledge to be credible to the parties. He further makes the distinction between a mediator having the intelligence and capacity to ask penetrating questions and the need for a mediator to be an expert;
- (iii) a mediator must be neutral with regard to outcome. To quote Stulberg:

If the mediator's job is to assist the parties to reach a resolution, and his commitment to neutrality ensures confidentiality then, in an important sense the parties have nothing to lose and everything to gain by the mediator's intervention.

Trust of the mediator by the parties is critical to the success of the process and this is secured and reinforced only if the mediator is neutral, has no power to insist on a particular outcome, and honours the confidences of the parties (1981: 96).

There are numerous other mediator roles and functions that are variously categorized by proponents of the process. However, the majority have been covered in one form or another, the main differences being in the terminology used to describe them. Knaster effectively translated mediation terminology into "plain English" when she gave a public lecture at the Australian National University in 1989. She said that a mediator performed three primary roles:

- (i) as a referee between parties and between factions within parties;
- (ii) as a group psychiatrist, to help people feel good about compromise which "many still see as a dirty word"; and
- (iii) as an architect "to help parties design three-humped camels", that is, it does not matter what a settlement outcome or agreement looks like as long as the parties which designed it think it is alright and as long as it does the job.

Environmental mediation runs the risk of being seen as a "quick fix" solution, a panacea for the environmental ills of the future. The process has considerable merit. Its proponents are very enthusiastic about its potential, as are most of the parties that have used it. However it is not without its critics. It is not infallible, and it is not desirable that a new mystique and a cargo of terminology and professional specialization be created to launch it as the "environmental face" of the 1990s.

Mediation in practice takes different forms. It has its risks, issues and inadequacies as does any other process, be it judicial or administrative. In order to assess the effectiveness, efficiency and potential of mediation, it is necessary to go beyond the theory to the practice.

3.6 Environmental mediation - in practice

The shape of environmental mediation has changed considerably since its debut in the Snoqualmie River dispute in 1973. Through the 1970s and into the 1980s it has evolved from a rather *ad hoc* and reactive process initiated by interested parties into a more sophisticated and professionalized approach which now takes a number of forms. Mediation has typically been used to resolve local, site-specific disputes, and these still remain the popular hallmark of environmental mediation. It can, however, take other forms, including those classified as policy dialogues, joint problem solving and "reg-neg" (regulation negotiation). These are particularly significant for environmental disputes in which government agencies are a party.

As Bingham (1986) found in her study, the largest number of mediated environmental disputes involve only public agencies, and many environmental disputes involve several government agencies at local, state and federal levels together with a variety of interest groups. This scenario translates readily to Tasmania, where all the disputes profiled involved at least one government agency and usually several public interest groups. From the author's experience of marine farm development in Tasmania, of a total of 18 parties with a direct interest in the siting of a salmonid farm, 12 were federal, state or local government agencies (Sandford 1989a).

3.6.1 Forms of mediation

(i) Site Specific Mediation

In Bingham's analysis of 161 cases mediated in the USA as of 1984, 115 involved controversies over site-specific issues and 46 involved issues of environmental policy (1986: 7). The scale of site-specific disputes can vary enormously. From the small seven hectare marine farm discussed in Chapter 4 to multiple land-use conflicts and the construction of a multi-million dollar pulp mill or tourist development in an environmentally sensitive area.

In Bingham's definition of a site specific dispute:

a case was considered to be site specific if it concerned a specific natural resource such as a river, lake or island or site that was defined by its proposed use whereas a case was considered to be a policy dispute if the area affected was designated by political boundaries such as a city, country, state or the nation as a whole or if it involved a type of natural resource than occurs in many locations, such as all rivers (Bingham 1986: 10).

(ii) Policy dialogue mediation

Policy mediation may be defined as:

a proactive form of intervention that involves the use of a mediator, facilitator, or other third party to promote cooperative problem solving in complex multiparty conflicts with major policy implications (Laue 1988:).

Policy dialogue does not take place over a particular site specific problem but over basic environmental policy issues (Amy 1987: 6). In the USA, the National Coal Policy Project was a successful effort to reach a consensus among business and environmental leaders on a major national environmental policy issue (Bingham 1986; Amy 1987). According to Murray and Gusman (cited in Bingham 1986: 18) this project "demonstrated a new process whereby individuals of opposing viewpoints could rationally discuss the issues until some agreement was reached". By 1979, the first major policy dialogue on options for high level radioactive waste disposal had been convened (Ehrmann in Bingham 1986: 20).

In the early days of policy dialogues, that is in the 1970s, government agencies were not represented as it was considered that this would encourage business and environmental leaders to communicate more freely (Bingham 1986: 20). However, as their exclusion proved to be an obstacle to successful implementation, government officials came to be included in all stages of policy dialogues. The 1980s have seen the growing use of policy mediation to shape and implement public policy and to resolve public policy disputes.

Public policy mediation can be used to shape policy (that is, the policy formation which often culminates in successful legislation), implement policy (that is, the translation of laws and policy decisions into implementation through the institutionalization of mediation procedures in agencies at all levels of government), and to resolve policy disputes

(Laue 1988). As Laue concludes in support of the creative use of mediation in public policy dialogues:

policy makers, mediators and citizens need not wait for laws requiring or promoting mediation and other collaborative approaches to solving policy problems. In fact, once a procedure is formalized in law, it becomes part of the lawyer's system and loses some of the creative and informal character that makes it useful in complex disputes (Laue 1988: 1).

However Ehrmann and Lesnick (1988: 98) make the point that "as with site-specific mediations, the policy dialogue is not a replacement for the traditional policy development mechanism but is rather a tool to complement traditional procedures in selected situations where the traditional approach may not be functional". Mediators also have a key role to play in the education of stakeholders and players in the public policy process who are not familiar with this approach.

(iii) Regulation-negotiation

The incorporation of negotiation into the administrative rule-making process (reg-neg) was proposed as early as 1986 (Bingham 1986). Amy considers reg-neg as "an example of a new and potentially very significant development in the area of environmental mediation - the formal institutionalization of mediation with governmental policy making processes" (1987: 6). This form of environmental mediation has been described as:

one involving efforts by regulatory agencies to design environmental regulations by first negotiating with environmentalists and industry. The intention is to avoid the litigation that usually is used to challenge new rules (Bingham, in Amy 1987: 6).

By 1988, negotiated rule making was being used as a way to incorporate consensus based decision-making into existing federal administrative procedures in the USA. According to Haygood (1988), in the process or model of reg-neg that is used in the USA, the agency responsible for proposing a regulation forms a federal advisory committee composed of representatives of groups with an identifiable stake in the regulation to develop a proposed regulation through face-to-face negotiations with stakeholders and interested parties. The absence of litigation subsequent

to the process is the ultimate measure of the success of reg-neg.

In the USA reg-neg has been used to develop emission standards for industry, the licensing of a high-level nuclear waste repository, the disposal of hazardous waste, and the *Asbestos Hazard Emergency Response Act (AHERA) 1986* (Haygood 1988: 81).

Application to Tasmania

All these forms of environmental mediation could well be used in Tasmania. Mediation of site-specific disputes has already been discussed. However, public policy dialogues and reg-neg could be employed in the development of the proposed Land Conservation legislation or in the much needed rationalization of existing land-use planning and land management legislations (Mant 1981; 1989). The development of policies and codes of practice for the use of agricultural chemicals is another example.

Mediation is undoubtedly an effective addition to the environmental decision-making process in its proactive forms of public policy dialogue and regulation-negotiation, and in its reactive form as a process for resolving disputes, be they site-specific, public policy or negotiation disputes. Just how effective the process is will remain an issue for debate and further study as the use of environmental mediation in Australia and elsewhere increases in the next decade or so.

3.6.2 The effectiveness and efficiency of mediation

Evaluating the success and effectiveness of mediation is not an easy task. As with any process there are few readily quantifiable or absolute results, and the question remains, how can intangibles such as improved communication and a lessening of confrontation be measured? Three questions appear to be central to the determination of the success of mediation as a process for environmental dispute resolution. They are:

- (i) Does mediation really work, and if so how well? That is, how is success defined?
- (ii) How do you know? That is, how do you evaluate this?

- (iii) Who says? That is, who, or from what perspective, is the evaluation being undertaken. For example, is the analysis of the effectiveness of mediation undertaken by a lawyer, a physical scientist, a social scientist, a professional mediator, or a party to a dispute?

In describing possible evaluation methodologies, Bingham (1986: 65) acknowledges that "people hold many and varied views, however, about what success means". She opts for relatively simple and observable measures in which the actual outcome of each dispute resolution attempt is compared with what the parties involved had hoped would occur. An alternative approach would be to measure each result against what mediation theory or theories of conflict resolution say should have happened. Bingham considers this approach inadequate, given the lack of agreement among social conflict theorists in relation to the prediction of outcomes and the lack of rigour of existing theoretical analysis (1986: 65).

Bingham applied three tests or measures of success in her study of 161 mediated disputes. They were:

- (i) was an agreement reached?
- (ii) to what extent did the parties support the agreement through the implementation process?
- (iii) to what extent was the process valuable, whether or not an agreement was reached?

She also analysed the objectives of the parties in each dispute and observed three categories of objectives:

- (i) to reach a decision;
- (ii) to agree on recommendations to a decision-making body not directly represented in the dispute resolution process; and
- (iii) to improve communications.

Her results were as follows: In 29 of the 161 cases documented, the parties' "principal objective was to improve communications"; in 132 of the cases,

the parties' objective was to reach some form of agreement with one another. Of these cases, 99 involved site-specific disputes and 33 involved policy issues, whilst overall agreements were reached in 78 percent of the cases.

Bingham found little difference in the success rates between site-specific and policy disputes in reaching agreement, although she did note implementation differences between site-specific and public policy disputes, in that some 80 percent of mediated site-specific disputes were fully implemented, 13 percent were partially implemented, and 7 percent were not implemented. However there was more difficulty in implementing the results of policy dialogues or negotiations in that only 41 percent were fully implemented, 18 percent were partially implemented, and 41 percent were not implemented.

As with the evaluation of any essentially qualitative program, determination of the success of mediation is neither easy - nor conclusive - in the minds of those more used to quantifiable results.

Bingham (1986) identified five potential success factors as:

- (i) sound mediator assessment of the dispute at the beginning of each case to assist parties in deciding if they wish to proceed with mediation and the nature and ground rules of the process are then clearly identified and accepted by the parties;
- (ii) the parties must have some incentive to negotiate an agreement with one another;
- (iii) parties must be able and willing to appreciate each others' positions and to work on developing creative alternatives;
- (iv) the way the consensus-building process is conducted appears to be an important factor in whether or not agreements are reached. The likelihood of success is not adversely affected by the number of parties, issues or the presence of a deadline.
- (v) the most significant, measurable success factor appears to be whether those with authority to implement the decision are directly

involved in the process. Where they are not directly involved, implementation is less likely.

In analysing factors likely to offset success Bingham commented that there were few absolutes and that "all remain hypotheses that require further study" (1986: XXII).

Susskind and Cruikshank (1987) also identified four characteristics of a good mediated or negotiated settlement:

- (i) fairness - all the parties see the outcome as fair;
- (ii) efficiency - a better process produces a more efficient as well as a fairer outcome;
- (iii) wisdom - the key to wisdom is described as "prospective hindsight"; and
- (iv) stability of agreement - it should be feasible, flexible and the timetable should be realistic with built-in provision for renegotiation. Stability is also dependent on the development of a good working relationship so that parties feel able to come back and renegotiate if necessary.

Like Bingham, Susskind and Cruikshank also have difficulty in identifying quantitative criteria against which to measure the effectiveness of mediation initiatives. It is this difficulty in the quantification of the success of the mediation process that tends to be seized upon by mediation sceptics. However participant responses appear to be more positive, for the parties involved are obviously most concerned about the outcome and the process. Parties evaluate the success of an outcome as being the extent to which it satisfies their interests and what they perceive to be the public interest, and the success of a process is gauged according to its fairness, legitimacy, efficiency and the extent to which the parties can influence the decision (Bingham 1986: 68). Where the parties have or wish to have an ongoing relationship, as is often the case in Tasmanian disputes, they are also concerned about their ability to communicate effectively with each other in the future.

Efficiency is a criterion that is commonly used in the evaluation of success.

Where mediation is concerned, its proponents argue that it is less expensive and faster than litigation but, as Bingham (1986: XXV) points out, "there has been little empirical evidence to support this assertion". She adds, however, that "very little information exists about how long it takes to either mediate or to litigate environmental disputes, and there are several conceptual problems in making comparisons between environmental dispute resolution alternatives and litigation" (1986: XXV).

In comparing the time taken to litigate or to mediate a dispute, Bingham notes that law suits that go to trial may take a very long time, but that few law suits actually go to trial. This is confirmed by McGillis and Mullen (in David 1987: 15) who estimated that some 80-90 percent of cases that commence litigation are settled prior to the court hearing. Furthermore, as Bingham comments: "voluntary dispute resolution processes are not necessarily fast if the issues are complex" (1986: XXV).

There are also the direct and indirect costs associated with dispute resolution. Here, Bingham suggests that the costs of preparing for negotiation may be comparable with the costs of preparing for some kinds of litigation, especially for public interest groups. A comparison of the two approaches vis-a-vis cost and time taken is difficult because of conceptual differences, and in many cases mediation is used after litigation has failed. In Bingham's opinion a major omission in such a comparison of the relative efficiency of litigation and mediation is an evaluation of the nature and quality of the outcome, and a more efficient process may not be desirable if it leads to a poor outcome as perceived by the parties.

Bingham concludes that although environmental disputes tend to take longer to litigate than do civil suits, it is likely:

that it is the threat of protracted litigation, not the length of the standard case, that creates the popular conception that mediation is faster than litigation (1986: XXVI).

From this study, Bingham surmises that the median duration of EDR cases is 5-6 months, but that some 10 percent of the cases took over 18 months to resolve, whilst "information about the costs of these cases is too sparse to report with any confidence" (Bingham 1986: XXVI).

Further study of the evaluation of the effectiveness and efficiency of the mediation process as a complement to litigation and as a dispute resolution

process in its own right is required and no doubt this aspect of environmental mediation will be researched and scrutinised well into the 1990s. An important aspect of any such research will be the development of both quantitative and qualitative evaluation criteria, which together are capable of reflecting the versatility, process and outcome effectiveness of environmental mediation.

3.6.3 Issues and inadequacies

The author's examination of the environmental mediation literature revealed that critical analysis of mediation was scant relative to the literature espousing its value. This is probably symptomatic of a new process which has been embraced with enthusiasm as the solution to projected resource allocation crises in the twenty first century. The criticisms identified appear to emanate either from the legal profession, which decries the replacement of litigation with mediation as a prescription for second-rate justice, or from mediators who champion the need for perfection of the process and the development of a code of ethics and training for mediators. Supporters of mediation also express concern about the difficulties of ensuring continuity of funding for mediation services. There has however been very little attention given to the politics of mediation, with the outstanding exception of Amy (1987).

Amy (1987) urges the need for a more balanced and critical analysis of environmental mediation. As he rightly says, mediation has generated much enthusiasm, it generates good press, and most of the literature on the subject is by professional mediators or mediation supporters. While acknowledging the significance and value of mediation, Amy also draws attention to some of the issues and criticisms associated with its rapid popularization. He discusses the need to separate myth from reality - is mediation really cheaper and faster than litigation? Are mediation and litigation mutually exclusive? Is mediation really important? Amy also refers to mediation as seduction, as its supporters argue that it is more democratic and fairer than traditional approaches. Finally, Amy expresses concern about the politics of mediation, particularly the imbalance of power between developers and environmentalists, and the future role of mediation in environmental politics.

The problem areas of mediation can be roughly categorized as:

- (i) issues associated with a perception of mediation as a compromise and second-rate justice;
- (ii) issues associated with the politics of mediation;
- (iii) issues associated with the professionalization and institutionalization of the mediation process; and
- (iv) issues associated with the funding of mediation services.

(i) Mediation as second-rate justice

As mentioned, the majority of criticisms of this ilk appear to be legal in origin and centre on the contention that mediation is the "justice" parties "choose" when they cannot afford legal representation, the inference being that "quality" justice is only available through the traditional judicial system. Mediation is certainly perceived as a threat to traditional practice by many mainstream lawyers. There are, however, those within the profession who support mediation and non-adversarial dispute resolution generally as a valuable addition to the traditional legal arsenal of skills and processes.

Another related concern is that the use of mediation may perpetuate the power imbalance between the advantaged and disadvantaged (in the case of environmental disputes, developers and environmentalists), the disadvantaged being denied access to legal empowerment by lack of financial resources. That is, mediation could be used as a sop to avoid reform of the legal system, thus perpetuating (rather than alleviating) distributional inequities.

Finally, it has also been persuasively argued by disputants, members of the judiciary and mediators that the adversarial and limited nature of the judicial system is not conducive to the resolution of the substantive issues in environmental disputes and the achievement of mutually satisfactory and stable outcomes.

Whilst understanding the criticism of mediation as second-rate justice, it must be emphasised that mediation should not be viewed solely as an alternative to litigation, but it should also be seen as an effective complement to the traditional judicial processes. Again, it is a case of

selecting the most appropriate and effective process for the resolution of the dispute in question and the process selected remains the choice of the parties based on a sound knowledge of the options available to them and the outcomes desired - be they to establish a legal precedent and/or to realise the substantive issues in the dispute and establish a more constructive communication process as preventative of future conflict.

A variation on mediation as second -rate justice, is that mediation is merely compromise in another guise. In fact Amy argues that:

a significant portion of the environmental community does not agree that mediation is an unmitigated political boon. Some suspect that mediation represents not so much a new effort at cooperation, but a new form of cooptation (1987: 98).

This contrasts with the opinions of Susskind and Cruickshank (1987), who contend that mediation is not synonymous with compromise. They argue that compromise requires each party to make concessions, to "give up" something, the end result being an outcome that rarely meets everyone's acceptable minimum - a political compromise achieved by splitting the difference. However, as Susskind and Cruickshank comment, "there is no midpoint between a hydro electric plant and a nuclear power plant" (1987: 20). Whilst acknowledging that mediation may sound like compromise, they state that it is rather a case of transforming win-lose disputes into all-gain agreements, and that "it involves the ' packaging' of items that disputants value differently" (Raiffa, in Susskind and Cruickshank 1987: 33). In fact:

All-gain solutions depend on each disputant's ability to invent a way of satisfying his or her own needs while meeting the opponents' needs. This requires cooperation even in the face of competing self interest (1987: 34).

While some environmentalists such as Hair (1984) are avid supporters of the value and potential of environmental mediation, others (such as Brower in Crowfoot 1980; McCloskey in Steinhart 1984; Duxbury 1983; and Parenteau 1983) are less than enthusiastic. Central to their concern is the enthusiasm with which industry has taken to mediation. In the USA, several key environmental mediation services (such as the Conservation Foundation and the National Wildlife Federation) receive substantial financial support from industry. These organizations are perceived to be on the right of the environmental movement (Amy

1987: 99), and their close relationship with industry in the context of environmental mediation exacerbates the suspicions of many environmentalists that mediation is just another industry ploy, "intended to pacify environmental groups and distract them from pursuing more troublesome approaches to environmental problems like litigation" (Amy 1987: 99).

It is therefore not surprising that some parties are sceptical of the benefits of mediation and see it as compromise in another guise.

(ii) The politics of mediation

Environmental mediation is, unquestionably, an important part of environmental politics in the USA, and fundamental to politics is the issue of power. Amy notes that proponents of mediation are quick to point out that there are substantial power imbalances in traditional policy making forums such as the legislature and the courts. However, "they are less quick to realize that such imbalances are also a substantial problem in environmental mediation as well - a problem that can often undermine the legitimacy of the process" (1987: 161).

Environmental mediation operates within the context of the political system. Inequities in the distribution of social, economic, and political power characterize all political systems and, as Amy argues, "these inequities will inevitably plague even new alternative political processes like environmental mediation" (1987: 161).

Environmentalists have also expressed concern that mediation may be used to obscure fundamental issues by focusing on disputes as isolated incidents, which effectively depoliticizes a dispute and discourages the recognition of that dispute as a symptom of a wider social or environmental issue.

Mediation as a form of political control is another concern (Amy 1987). Abel (1982) argues that throughout the history of the ADR movement in the USA mediation has been used as a way of undermining the political power of newly emerging political groups, and Amy supports this view, noting that it was only in the mid 1970s (that is post the National Environmental Policy Act 1969) when environmentalists began to exercise their expanded political powers and legal rights, that industry became

anxious to get environmental issues out of the courts. Amy interprets these actions of industry not as a desire to negotiate with environmentalists but as a strategy of disempowerment by distracting environmentalists from the possibilities offered by litigation since the passing of the National Environmental Policy Act. The use of environmental mediation to depoliticize environmental issues and to disempower environmentalists is, in Amy's opinion, "one of the most disturbing political implications of this new technique", although "what proponents fail to appreciate is that the main political biases in mediation emanate from the process, not the mediators" (1987: 197).

Crowfoot considers that most mediators subscribe to a pluralist theory of political power, that is, they believe that power is distributed relatively equally among the competing interests in environmental controversies (Crowfoot 1980), and usually argue that some balance of power is possible because of the range of sources of power available to parties in an environmental dispute. Amy (1987: 130) cites money, organization membership, legal expertise, scientific expertise, political influence, legal standing, negotiating skills and favourable publicity as potential sources of power differentially available to groups.

A factor that can, to some extent, redress an apparently skewed power imbalance, is the presence of a mediator. Susskind, (himself a very experienced mediator) in Amy (1987: 157) argues that a mediator may be able to assist in developing the basic negotiating capabilities of less experienced parties to ensure a more equal relationship. However, Amy (1987) and Carpenter and Kennedy (1988) are critical of this stance as, in their opinions, such action by a mediator may prejudice her/his neutrality, or at least the parties' perception of mediator neutrality.

While acknowledging that the only long-term and viable solution to the problem of power inequities is the establishment of a more equal distribution of political and economic power between disputants (Amy 1987: 162), some solutions to this problem of power imbalance in environmental mediation have been proposed. Cormick (in Amy 1987: 140) suggests that a code of ethics for mediators should include the responsibility to ensure that all affected parties have an opportunity to participate. Sullivan (in Amy 1987: 140) recommends that environmental mediation should be mandated by law, as are labour-management disputes. Yet, as Amy points out, one of the most frequent complaints about labour-

management agreements is that they do not always reflect the public interest (1987: 141).

Finally, Amy proposes the institutionalization and legalization of mediation; that is, a move away from the more usual *ad hoc*, informal arrangements to more formal and regulated ones mandated by legislation. Until this is achieved, Amy argues the problem of unequal access is likely to persist (1987: 142).

While not disagreeing with Amy's contention that power imbalances among parties are characteristic of many environmental disputes, to wait until these imbalances are redressed by the institutionalization and legalization of mediation as is proposed by Amy, is unrealistic. As discussed, mediation has proven successful in the prevention as well as the resolution of disputes and even Amy argues its value in policy formulation and regulation-negotiation. Ultimately, the value of mediation is judged by the parties and Bingham's analysis of party satisfaction found that the responses of the parties to mediation appeared to be more positive (about the process and outcome) than those of the mediation critics (Bingham 1986: 68).

(iii) The professionalization and institutionalization of mediation

Proponents of mediation and, in particular, mediators, have tended to focus on perfecting the process itself, the formulation of codes of ethics for mediators, and the development of skills and process-oriented training programs. It is only since the mid 1980s that attention has been focused on the politics of mediation (Amy 1987), and even this remains peripheral to those expounding the benefits and potential of non-adversarial dispute resolution.

There now appears to be a movement away from the original concept of training people with diverse skills and experience as mediators, towards the promotion of mediation as a profession in its own right. In fact, mediation in the USA exhibits all the characteristics of a profession, including formal qualifications (Boreham *et. al.* 1976). Australia has yet to reach the level of sophistication and professionalization seen in the USA, however the indications are there. Law Schools in several Australian universities have now introduced into their curricula, formal units in ADR, albeit not specifically in EDR.

The institutionalization of mediation has been a feature of the mid 1980s with the establishment of state-wide offices for the resolution of public disputes in a number of American states (Haygood 1988). The consensus supporting this move is that it facilitates access to government decision making and the promotion and adoption of mediation across state agencies.

These trends towards the professionalization and institutionalization appear to contradict the origins and purported value of the process as a non-elitist and flexible approach to environmental dispute resolution. However as Amy (1987: 16) notes, mediation has become a growth industry in the USA and the professionalization and institutionalization of mediation are both by-products of this rapid growth. Cynically, they may also constitute insurance for the future career prospects of a new breed of professionals. However, as mentioned previously, Amy considers that the institutionalization of environmental mediation may be a solution to the problem of power imbalance inherent in most environmental disputes; while professionalization as suggested by Cormick (in Amy 1987: 140) would guarantee mediator standards of performance, ethics and training.

Conceding that professionalization may go some way towards resolving the problem of "mediation as seduction" (1987: 121), Amy retains an ambivalent attitude to such a development (1987: 124). Nevertheless, the key question here is whether the "seduction" can be mitigated, given that it is unlikely to be eliminated. To this end, Amy concludes that the use of trained, independent mediators would help overcome the naivety and inexperience of some participants and would lessen the likelihood of fraud and trickery in negotiations (1987: 127).

(iv) Funding of mediation services

Another key issue about which mediation proponents are concerned is funding - the sources and continuity of supply of funding for mediation services. In the USA, mediation services have traditionally been subsidized by government or they have been underwritten by funding from philanthropic trusts such as the Rockefeller Foundation. However, "funding has always been the Achilles heel of environmental mediation" (Amy 1987: 221).

Freestanding public dispute centres are usually supported by foundation grants or by fee for service contracts (Susskind and Cruikshank 1989); institutionalized state EDR offices are government funded, though some supplement their income by fee for service; and bodies such as the Conservation Foundation receive financial support from industry (as discussed previously). There are also private public dispute resolution services and consultants who charge on a fee-for-service basis.

There is no uniformity of funding sources and many services are funded on a pilot basis, as with the five state offices of mediation which receive grants from the National Institute of Dispute Resolution (Susskind and Cruikshank 1987; Haygood 1988). Security and continuity of operation is thus often uncertain and fee-for-service for environmental disputes is neither easy to determine nor to administer when there are frequently multiple and changing parties, complex issues and, more often than not, an imbalance of power and financial resources among the parties. The questions of who pays the mediator and how much remain unresolved and an obstacle to the strategic development of many environmental mediation services.

3.7 Conclusion

Environmental or public disputes are the most complex of the disputes addressed and resolved by non-adversarial dispute resolution processes such as mediation. With their multiplicity of issues and parties, and their focus on the public interest rather than on private interest, public disputes often cannot be satisfactorily resolved by traditional judicial and administrative means.

Dissatisfaction with the inadequacies of traditional adversarial approaches to environmental dispute resolution prompted those involved to look for more effective and efficient processes which were also capable of addressing the substantive issues in distributional disputes relating to resource allocation and use. As a result alternative dispute resolution (ADR) techniques have been adapted for use in environmental dispute resolution (EDR) with considerable success.

The use of mediation to resolve disputes is not a new phenomenon. As outlined, it has been widely practised in China and Japan to resolve community and social disputes and in the USA it was used by several

minority groups such as the Quakers prior to being formally institutionalized and professionalized in the twentieth century.

Its progression as a process for the resolution of community disputes to labour, social, and most recently environmental disputes, has been rapid in an historical sense. Since the 1970s, it has been enthusiastically embraced in the USA in particular, as having the potential to both prevent and resolve environmental disputes where traditional judicial administrative processes have failed.

Australia lags some way behind. As with Canada and New Zealand, it has a Westminster system of government and so differs from the USA. The extent to which mediation is both appropriate and successful here remains to be seen. Nevertheless, one of the recognized values of mediation is its potential to prevent the development and escalation of environmental disputes as in its application to policy dialogues and regulation - negotiation.

There is a considerable body of literature on the characteristics of public or environmental disputes and the mediation process per se; including techniques, mediator roles and functions. There has also been much written on the use of mediation as a stand-alone strategy and process for the resolution of site-specific disputes.

In fact success of environmental mediation in the resolution of site-specific disputes in the 1970s has resulted in its rapid growth in a number of countries, although the USA remains the world leader in this field.

In spite of its popularization, as with any rapidly growing industry, issues and inadequacies have been identified for future debate and continue with rectification.

Some issues requiring further research and analysis are the need for more rigorous evaluation of the success and effectiveness of mediation as a process for resolving environmental disputes; the politics of mediation, particularly the impact of mediation on the power differential among disputants, and issues relating to the funding of mediation services such as sources, continuity of supply and accountability.

In the author's opinion a further issue and possible inadequacy is the

tendency for the majority of the literature to focus on the practice of mediation as an alternative to traditional processes. More attention should be paid to the pros and cons of incorporating mediation in existing and proposed judicial and administrative systems such as those relating to EIA and development approval processes. The introduction of mediation at strategic points in these systems would expand the dispute resolution options available to disputants and government agencies and so assist in addressing prevailing criticisms of inflexibility, formality, and the inability of traditional systems and processes to resolve the substantive issues in disputes.

However, it appears that environmental mediation in 1989 is a proven and effective EDR process which can readily complement existing judicial and administrative systems, or it can be used as an alternative to traditional processes in appropriate cases. It is in this context that Tasmanian environmental decision making and dispute resolution will be analysed, with a view to determining to what extent environmental mediation may be appropriate in this state as both an integral part of judicial and administrative systems and as a dispute resolution process in its own right.

CHAPTER 4

ENVIRONMENTAL DECISION MAKING AND DISPUTE RESOLUTION IN TASMANIA

4.1 Introduction

Natural resource management is the key to Tasmania's future (Callaghan, 1977). The State's economic dependence on the management of its resources guarantees that in the 1990s, effective resource planning and management will be critical if it is to survive economically, socially, environmentally and politically (Crowley, 1989). Further environmental disputes can be predicted with certainty as government, industries and public interest groups attempt to reconcile their divergent interests (Hay, 1987).

At present, management of the State's natural resources is handled by multiple jurisdictions and government departments, each with its own "package" of legislation, policies, administrative infrastructure, practices and procedures. At best it is fragmented, inconsistent and frustrating for all parties. It is a judicial and administrative quagmire that promotes rather than resolves environmental disputes.

Environmental decision making is resource focused. Each resource, be it minerals, forests, fisheries, or land is managed as a discrete entity via a resource-specific legislative and administrative decision making system. There is no integrated resource management or land-use strategy or system for the State.

In addition to this multiplicity of jurisdictions, there is often duplication and overlap of practices and procedures, there being no priority jurisdiction in most cases so that decisions of resource planning and management are subject to negotiation among the parties perceived to be responsible for the resource. It is a generally piecemeal approach to resource management.

The inadequacies and complexities of current systems are highlighted by multiple land-use issues such as industry proposals for forestry and mining operations in designated national parks and World Heritage areas. Traditional judicial and administrative systems which are products of the past when resources were regarded and were managed individually, are no longer appropriate in an age when resources are considered to be interrelated and interdependent elements of a total environmental system.

Government departments, industries, public interest groups and members of the judiciary recognize the need for and the value of a more planned approach to resource management on a state wide basis. However difficulties arise in relation to the design and implementation of strategies and processes to achieve this. The uniqueness of each resource, and different philosophical and management objectives, priorities and practices must be reconciled. For example, mining and forestry are perceived to be resource exploitative and, in the case of mining, the exploitation of a non-renewable resource. On the other hand, land-use planning and environmental protection tend to be regarded as protective of resources.

The potential for conflict is inherent in any decision making process, none more so than in that of environmental decision making where ideologies, power and emotions are often in competition for the control of limited or diminishing resources. Simplistically, the theme of most environmental conflict is resource exploitation versus resource conservation.

Conflict in itself is not necessarily dysfunctional. It is the potential for it to escalate, to spiral out of control, that becomes a problem. This is not uncommon in environmental conflict where, as mentioned previously, there is a potentially explosive mixture of facts, emotions, and vested interests. A level of conflict between opposing parties may exist, or be managed, for a prolonged period. However conflict which commences as a resolvable problem can readily spiral out of control into a bitter, destructive and costly dispute.

No dispute, environmental or otherwise, is merely a factual, logical and legal event or sequence of events. All disputes comprise a complex interaction of law, values, perceptions, attitudes and emotions which

must be identified, addressed and resolved (Sandford 1988).

Environmental disputes are public disputes, that is, they focus on public issues and the public interest rather than on private issues. They usually encompass a broad range of biophysical, socio-economic, cultural and political factors and can be site-specific or public policy disputes. In addition to their inherent complexity, environmental disputes are rarely clearly defined. More often than not they involve multiple issues and multiple parties, are dynamic - never static - and can rapidly become high profile media events and key issues in political campaigns (Sandford 1989b:1).

Evidence of the complex, dynamic and potentially high profile nature of environmental disputes can be seen in the development of the Brunswick-Richmond 220 kV transmission line dispute. What started as a proposal by the State Electricity Commission of Victoria (SECV), to implement a technological solution to ensure security of supply to a Melbourne network, escalated into an acrimonious public debate. From its commencement in 1969, the focus of the dispute shifted from technological issues to community concern about the potentially negative impacts of electromagnetic radiation on public health. The dispute culminated in the SECV's withdrawal of its proposal in 1989 - some twenty years after it was first initiated (Blake, 1988; Victoria Powerline Review Panel, 1989).

In Tasmania, proposed construction of the Wesley Vale pulp mill in the north of the state, rapidly developed from a local dispute about the nature and siting of an industrial facility in a predominantly agricultural area, to a state, national, and even international issue which was instrumental in the demise of the Liberal government, the election of five Green Independents to the Tasmanian Parliament and the formation of the historic Labor-Green Parliamentary Accord.

It is therefore not surprising that, in anticipation of the potential for conflict, environmental decision making processes incorporate systems and/or procedures for dispute resolution. These often take the form of objection and appeal systems within each jurisdiction (Jeffrey, 1987). In this way, they act as fail-safe mechanisms in the event of an error or a malfunction in the environmental decision making process. The purpose of objection and appeal systems is to minimize the negative impact of an inadequate or incorrect decision on the decision making process itself, and in so doing, protect the public interest.

4.1.1 EDR in Tasmania: operations and procedures

There are two types of environmental dispute resolution (EDR) systems in operation in Tasmania. They are the judicial system in which disputes are heard in the Magistrates Court or the Mining Warden's Court, and the administrative tribunal system in which disputes are heard by a panel of appropriately qualified persons, one of whom usually has legal qualifications. It is quasi-judicial hearing process.

Each resource has a unique objection and appeal system for the management of disputes which fall within its jurisdiction. It may be either a judicial or an administrative tribunal model. There is, however, a trend towards the use of administrative tribunals rather than courts both in Australia and overseas, the fundamental reason being the perceived ability of the former to more adequately address complex public interest and policy issues. This trend is also evident in Tasmania.

The thesis will now examine dispute resolution in five (5) environmental decision making systems in order to gain an overview of the operations, procedures and effectiveness of EDR in Tasmania as these systems are the only formal processes by which environmental disputes can be resolved within each jurisdiction.

It should be noted that since these EDR systems were examined in 1988 and early 1989, there has been a change of government in Tasmania from a conservative Liberal government which was regarded by many as favouring the imperatives of development rather than those of environmental protection, to an Australian Labor Party-Green Independent Accord. The Green Independents now hold the balance of power in the House of Assembly which is the lower House of the Tasmanian Parliament. This innovative form of government has made political history in Australia and it is popularly perceived to be more environmentally committed than its predecessor.

Although the change of government is politically significant, it has not, as yet, had an impact on EDR systems, having only been in office since June 1989. The major impact to date has been on organizational structures, rather than on processes. The new government has rationalized the public sector, reducing the number of Tasmanian State Service

departments from 54 to 18.

At this stage (October 1989) the authority and functions of the EDR systems examined in this thesis remain unchanged, although most former Departments now have divisional status within larger, restructured departments. The resource and EDR systems to be examined are as follows:

- I. **Marine Farms**, which come within the *Sea Fisheries Act 1959 (Tas.)*, reprinted in 1987 to incorporate the 1982 marine farm amendments. The Act is administered by the Sea Fisheries Division, Department of Primary Industry, formerly the Department of Sea Fisheries.
- II. **Mining**, which is covered by the *Mining Act 1929 (Tas.)*, and the *Mining Amendment Act 1986 (Tas.)*. It is currently under review. The Act is administered by the Mines Division, Department of Resources and Energy, formerly the Department of Mines.
111. **Environmental Protection**, comes within the jurisdiction of the *Environment Protection Act 1973 (Tas.)*. It is administered by the Environmental Management Division, Department of Environment and Planning, formerly the Department of Environment.
- IV. **Land-Use Planning**, is covered by the *Local Government Act 1962 (Tas.)*. It is administered by the Planning Division, Department of Environment and Planning, formerly an independent Town and Country Planning Commission.
- V. **Forestry**, is bound by the *Forestry Act 1920 (Tas.)* and the *Forest Practices Act 1985 (Tas.)*. It is administered by the Forestry Commission.

As we have seen, environmental law is predominantly a product of legislation (Bates 1987) and as such it is an instrument of government which is dependent on the administrative systems and processes of the public sector for its implementation. The objection and appeal systems of the environmental decision making processes are, however, quite deliberately located outside the sphere of control, if not the sphere of influence, of the public sector. Objection and appeal systems are systems for the review of resource management decisions made by the bureaucracy

(and in some cases by one or other Minister) which administers the relevant jurisdiction. It is therefore important to ensure that the review systems are independent of political decision making, hence this location outside the bureaucracy.

In Tasmania, two of the objection and appeal systems are in the judicial mode - sea fisheries, which includes marine farms, and mining. The remainder, environmental protection, land-use planning and forestry, are administrative.

Each dispute resolution system will be considered in the context of the relevant environmental decision making/approval process, which usually commences with the submission of an application for a development proposal to the appropriate administrative authority or government department. There are process and procedural parallels among the 5 systems studied in this thesis. There are also several issues raised and inadequacies identified in the management of disputes within each jurisdiction. These are highlighted by case studies of disputes.

The jurisdictions will now be considered individually with the objective of identifying commonalities of issues, inadequacies, and process and procedure, so that it can be ascertained whether environmental disputes in those jurisdictions may be more appropriately handled by other means (such as environmental mediation).

4.2 Judicial objection and appeal systems

4.2.1 Marine farms

Aquaculture is a major growth industry for Tasmania. It is a lucrative industry with significant export potential and it has been hailed as a potential saviour of the Tasmanian economy. It is also considered more environmentally sound than many resource development or extractive industries and it has electoral and tourism appeal. The industry has expanded rapidly since 1982 when the first salmonid (Atlantic salmon and Rainbow Trout) farm was established with the State government as a Director and shareholder. Prior to the development of salmonid farming, aquaculture in Tasmania had concentrated on shellfish production such as oysters, which were grown on intertidal lease sites and on a relatively small scale.

As a capital-intensive, "glamour" industry salmonid farming has attracted considerable media and public attention. This has also impacted on shellfish production.

The aquaculture industry is not without critics who view the apparent proliferation of marine farms in recreational waterways as uncontrolled development. This has aroused concern about the deterioration of water quality, noise, odour, security lighting at night, seal shooting on salmonid farms and, in particular, the restriction of public access to traditional fishing and recreational waters. Some marine farms also have processing facilities on land-based sites adjacent to the lease or permit. Conflict is therefore predictable; even inevitable.

4.2.1.1 Magistrates' Court

Objections to lease/permit applications and appeals against the Minister's decision to grant or refuse an application are heard by a Magistrate sitting alone in the Magistrates' Court. Reasons for his/her decision are usually given in writing subsequent to the hearing.

4.2.1.2 Marine farm approval process

- (i) The Act stipulates that an applicant must lodge a written application with the details of the proposed marine farm, including maps of the intended area, which are then published in a newspaper with a general, rather than local circulation in the State.

A potential marine farm developer cannot establish a farm without first lodging an application for a lease or permit with the Sea Fisheries Division, Department of Primary Industry. A lease confers exclusive possession of the sea bed and the waters above it within the lease area, while a permit applies solely to the waters specified in the permit. The former is used for shellfish farming and the latter for salmonid farming or for specific shellfish culture techniques such as deep water culture.

- (ii) The advertisement must be published not less than 28 days before the Minister makes a decision to grant or refuse the lease or permit application.

- (iii) Objections to the granting of an application are made to the Minister and must be lodged within 28 days of the publication of the notice of application.

The categories of persons who may object to the granting of an application are strictly limited and only persons who have lodged an objection under (S.18) have a right of appeal under S(23)(c).

- (iv) The decision to grant or refuse to grant an application is vested solely in the Minister for Primary Industry. If he grants the application he may impose such conditions or restrictions as he determines.

The legislation does not provide criteria to be considered by the Minister in reaching his decision. As Hannon (1988: 287) indicates, "therefore it may be said that he has an unfettered discretion".

- (v) Appeals against the decision of the Minister to grant or refuse the application are made to a Magistrate and both the unsuccessful applicant and objectors have a right of appeal.
- (vi) Objections and appeals are heard by a Magistrate in the Court of Petty Sessions. Parties may choose to be legally represented. This is not mandatory but it remains an adversarial arena where parties who do not have legal representation are rarely able to counter those who do. There is a distinct imbalance of power in this situation.

The Magistrate has the power to award costs against objectors but this is not usual practice.

- (vii) There is then a final right of appeal to the Tasmanian Supreme Court on points of law only.

To quote Hannon (1988: 289), "the effect of this legislation as interpreted by the Courts is to exclude interest groups from participation in the objection and appeal process". Hannon (1988: 290) then concludes, "whether those provisions provide adequately for persons or concerned groups to protect a real or perceived interest is a matter of policy for

Government and not for the Courts to determine".

In the author's experience, these legislative and procedural restrictions only serve to cloud the substantive issues of the dispute and engender misinformation, confusion, and suspicion among the parties as developers, objectors and appellants are forced into an adversarial arena. There is no provision for conferencing. Once an objection or appeal is lodged, Sea Fisheries staff are unable to confer with objectors as the Department, being the manager of the resource, is responsible for advising the Minister and for the enactment of the legislation.

4.2.1.3 Profile of a marine farm dispute

Many of the disputes about the siting and/or expansion of marine farms could be resolved without the need to go to a public hearing process. The following dispute is one such example.

The profile of this dispute was obtained from numerous discussions with objectors, a site inspection, attendance at public meetings and court hearings, and discussions with the developer and officers from the Sea Fisheries Division. The author did not have access to either the developer's file, nor that of Sea Fisheries Division. The objectors used the author as a resource in identifying the relevant legislation and regulations as they claimed that the Sea Fisheries Division refused them access to information.

Reason for Dispute

In 1989, the developer of an established oyster farm decided to apply for a permit to expand his operation. The original farm was an intertidal lease and the expansion was to incorporate deep-water culture and so make the lease more commercially viable. The developer also had a second intertidal lease, in a neglected condition, further up the bay.

The marine farm was located in a sheltered bay, regularly used by a small number of professional fishermen and permanent local residents for fishing and recreational uses. The site is also on a popular tourist route.

Sea access to and from the bay was via a deep water channel which skirted the southern edge of an island at the mouth of the bay. To the north of the island was a reef which made access via this alternative

route hazardous in certain weather conditions.

Local residents and fishermen were concerned that if a permit were granted to extend the established farm, it would seriously hinder safe passage through the channel to the bay. Visual pollution was another objection compounded by local residents' prior knowledge of and experience with, the neglected condition of the developer's other intertidal lease site. There was also concern that marking buoys and lights which are mandatory on permits would be visually offensive.

The developer disagreed and claimed the objections were emotional rather than factual.

A public meeting was called. Significantly there was no accurate site map of the proposed permit, the advertisement published by Sea Fisheries Division being declared inaccurate by both the developer and the potential objectors. There was considerable debate, a lack of accurate data and information about the site, and an inadequate understanding by all parties of the administrative processes and the status of the site, be it a lease or a permit. There was no representative from Sea Fisheries present.

The public meeting decided that all objectors who had standing as determined by the Act would lodge Objections. There was little time to do so, as the public meeting was called in response to the advertisement, local residents having had no prior knowledge of the intention to expand the farm. This meant that within a 28 day interval after the advertisement of the notice of application, a public meeting had to be organized, and decisions had to be made as to whether to object or not on the basis of inadequate and inaccurate information. Objections then had to be prepared and taken to Hobart for lodgement within the requisite 28 days.

Now, 28 days may seem more than reasonable to government officials in Hobart. However for environmental and operational reasons most marine farms such as this one are sited in isolated areas and potential objectors must, by virtue of the very limited law of standing, be resident/working in the immediate area. Consequently the objectors' problems of access to information and communication with the relevant authorities were compounded by the isolation factor and the logistics of getting to and around Hobart during a 5 day public sector working week.

A hearing was duly scheduled in the Hobart Magistrates' Court. The developer had legal representation, whilst the objectors did not and could not have afforded representation as most were on age pensions or had low or seasonal incomes.

In spite of the Magistrate's efforts to ensure a fair hearing, the procedure was intensely adversarial, and intimidating for the objectors whose personal integrity was questioned by the developer's legal representative as a strategy to undermine the credibility of several objectors.

The hearing took two days, several weeks apart. The objectors had to travel to Hobart on each occasion and several objectors decided against a court appearance on the second day as they were intimidated by the procedure and convinced they could not cope with the approach by the defendant's lawyer, which they interpreted as personal attacks rather than "legal tactics". Their absence was then portrayed by the lawyer as indicating a lack of sincerity and substance in their objections.

The Magistrate in handing down his decision made reference to the inadequacies of the legislative and administrative system (Bryan 1989).

He noted:

- The absence of information from the Minister for Sea Fisheries as to whether a lease or permit was intended. It was decided that a permit was intended. This was significant as the grounds of objection and appeal for each differ and so, consequently, does the standing of potential objectors.
- Scenic beauty is not a ground for appeal, landscape integrity and tourism impact notwithstanding. However Bryan disagreed with the precedent set by Hannon (1984) that visual impact was outside the terms of Section 18 (3), that is, the grounds for objection to an application for a lease or permit. In Bryan's opinion, to admire the scenic beauty of an area which is generally accepted as an area of such beauty is a legitimate use of that area and that an appreciation of the beauty of nature is a "use" of that area within the meaning of Section 18 (3).

He therefore admitted the evidence of grounds of objection related

to scenic beauty of an area where it was proposed the permit would have been affective.

Expert evidence on the negative environmental impact of such development on the local tourism industry was refused hearing by the Magistrate on the grounds that tourists were not persons whose use of that area, let alone their livelihood within the meaning of the section, would be affected by the working of the permit area (Bryan 1989: 5).

- Objections on the ground that the extension of the lease would constitute a navigational hazard were dismissed. The Magistrate noted that the area of the permit was some 7 hectares in a total bay area 1000 hectares or more and that the presence of navigation lights on hazards such as the permit site and the nearby island would resolve these problems.

Bryan (1989: 8) concluded that "there will be no navigational inconvenience at all caused to those objectors by the fact of fish farming operations in the proposed permit area" and that in his view the point had not been reached whereby the extension of the farm would significantly change the nature of use of the bay as a scenic attraction and for recreational navigation.

The decision was that all objections were unsuccessful. An attempt by the developer's lawyer to have costs awarded against the objectors was not upheld by the Magistrate nor supported by the Sea Fisheries Division.

4.2.1.4 Issues and inadequacies

The limitations of the traditional judicial model in the resolution of environmental disputes such as this have been summarised by Michael Jeffrey, Q.C. (1986: 317) as:

- little account is taken of the public interest;
- it is limited by rules of evidence;
- interest is centred on the adversarial relationship between proponent and those in opposition (objectors and/or appellants);

- the inflexibility of procedures.

To this can be added the legal representation of parties and the potentially high costs of litigation.

In the marine farm dispute, as an example of judicial limitations in action:

- the private commercial interest of the developer was the central issue rather than the broader public interest, although a concession was made to the validity of scenic beauty;
- expert evidence from the tourism industry was not admitted as it did fit into the limited rules of standing of objectors;
- the adversarial arena disadvantaged the objectors. As indicated previously the objectors were less articulate, ignorant of the intricacies of the law and legal procedure and had difficulty coping with the legal tactics of the developer's legal representative;
- court protocol and procedures meant that although selective photographic evidence could be submitted by the developer, the Magistrate was not able to benefit from a site inspection which may have assisted him in understanding residents' concerns about navigational hazards from the intrusion of the farm into the channel.

The role of the bureaucracy was a most significant factor in the perpetuation rather than the resolution of this dispute:

- all parties unanimously agreed that the Sea Fisheries Division's performance was sub-standard;
- information available from the Sea Fisheries Division was inadequate, inaccurate and inconsistent;
- the Division did not advise any party as to whether it was a lease or a permit that was to be granted;

- site maps were not available and were merely approximations as to dimensions and locations on inappropriately large-scale maps.
- site dimensions and locations also changed depending on which officer was supplying the information;
- there were no readily identifiable channels of communication with the public.
- once objections were lodged, Sea Fisheries officers could no longer confer with and/or advise the objectors, as the Division was a party to the dispute in its capacity as the Minister's representative. This denies opportunities for Divisional officers to formally confer with parties in an effort to find a solution.

Author's comment

This dispute could have been readily resolved out of court using a third party neutral. Had there been a mechanism available to parties, whereby they could have come together to negotiate a resolution, the dispute need never have gone to court with its long-term negative impacts for all.

Discussions by the author with the objectors indicated that the primary concerns revolved around the location of the permit boundaries and the degree of intrusion by the farm into the channel. In discussion, the author, on the basis of her aquaculture experience, was able to point out to the objectors the possibility of altering the shape of permit boundaries to lessen intrusion into the channel and thus the potential as a navigation hazard, while still allowing the developer his 7 hectare permit area.

This solution was acceptable to the objectors. Subsequent discussion with the developer indicated that this would have been acceptable to him. However, legal proceedings were underway and all parties felt that, in the absence of an alternative mechanism, they were locked in and had to proceed.

It was a "no win" situation for all. The developer and objectors have to co-exist together in an isolated area while for the legal professionals it is just another case.

4.2.2 Mining

Mining is one of the State's most valuable industries and a major employer. In 1985/86 it produced 54.9 per cent of the State's export earnings and in 1987/88 the value of production from Tasmanian recovered minerals was \$504.87 million, an increase of 29.1 per cent over the previous year (according to the Report of the Minister of Mines 1987/88). The Report further stated that the total value of the Tasmanian mineral industry for the year surpassed the billion dollar level at \$1159 million, which represented an overall increase of 20 per cent over the previous year.

Mining is an extractive industry and each mine represents a non-renewable resource which is progressively reduced by operations to depletion. Consequently, to maintain the industry at its current level, new ore bodies must be discovered to replace the extracted resources. Without new discoveries the industry will eventually become non-existent. Projections for the year 2000 indicate that it is possible that the industry will be reduced to well below half of its current value without new discoveries. The future of the industry is therefore clearly dependent on mineral exploration within the State (Department of Mines 1988).

As further noted in the Directors Report 1987/88, exploration is the key to the future.

4.2.2.1 Mining Act 1929 - under review

The Mining Act 1929, and the 1930 regulations have been amended on many occasions, to the point where the former Department of Mines published a Mining Act 1929 "unofficial consolidation" to assist industry and the public to negotiate the maze.

The Act is administered by the Mines Division, Department of Resources and Energy, and during 1989 it has been undertaking a public review of what is acknowledged to be outdated legislation and procedures.

In identifying issues for public discussion in the review process, the former Tasmanian Department of Mines 1989 noted that mining for metallic minerals has, in the main, been confined to the less populated regions of the State, but it is now known that the formations which host metallic

mineral deposits underlie rocks which have produced good farming soils. Consequently, there has been increasing interest in exploration on private land and "the aim of the new Mining Act will be to promote a balance between the interests of residents and the needs of the community".

This review is still in progress, opportunity for public comment having ceased at 30 September 1989. To date neither the findings nor the proposed changes have been released. It is likely that a recommendation will be put for an administrative tribunal model rather than to retain the present judicial model whereby objections and appeals are heard by the Warden at a Mining Warden's Court.

4.2.2.2 Mining Warden's Court

Objections to the granting of an exploration licence or a mining lease/permit are heard by the Mining Warden sitting alone in the Warden's Court. There are Wardens in each of three regions in the State, the south, the north and the north-west, and hearings are conducted in each area depending on the location of the licence/lease in question.

Appeals against the Warden's decision may be made to the Tasmanian Supreme Court on points of law only.

4.2.2.3 Mining approval process

A person wishing to evaluate and then mine a mineral resource is required by the Act to apply for:

- (i) an exploration licence to survey an area, take samples of soil, rock or water, and test for other magnetic, electrical or physical problems as required in order to identify the potential viability of mining the resource; and
- (ii) a mining lease, which authorizes mining activities on Crown or private land and which is approved by the Governor in Council. This process commences when an applicant for an exploration licence is satisfied that the resource is feasible to mine.

Both exploration licences and mining permits/leases may be held by individuals or by companies.

Mining leases occupy less than 1 per cent of the area of Tasmania and much less than this area is disturbed by mining operations. It is the Exploration Licence that causes the most controversy (Tasmania, Department of Mines 1989a). However, both exploration licences and mining leases are subject to objections and appeals.

(i) Exploration Licence

Exploration may be undertaken on private land either by exploration licence issued under the Mining Act, by a permit to Enter and Search (now rarely used), or by Owner's Consent (Tasmania, Department of Mines 1989a). Licences are granted for an initial period of 12 months but may be renewed conditional on satisfactory performance and a satisfactory programme.

The application procedure for an exploration licence is as follows:

- (1) Application is made to Director of Mines detailing the work to be carried out. The decision to issue the licence is made by the Minister on the recommendation of the Director.
- (2) Advertisement is placed in a local newspaper by the applicant showing the location of the proposed licence and stating that objections may be lodged by those persons with 'an estate or interest' in the land.
- (3) Objections to the application must be lodged with the Director of Mines within 28 days of the advertisement of the public notice of the application.

A copy of the objection is served on the applicant for the exploration licence by the Registrar of Mines, an employee of the Mines Division.

- (4) Hearing of Objections. Objections are then heard by the Warden in the Mining Warden's Court. The Warden may dismiss or uphold the Objections.
- (5) If the Objections are dismissed, an exploration licence is then issued by the Minister.

- (6) An appeal against the Warden's decision may be made to the Tasmanian Supreme Court on points of law only.

The Minister's decision may also be appealed in the Supreme Court if it is considered that he has not acted properly in making his decision, for example, by failing to take into account relevant matters, or on other grounds of natural justice.

(ii) Mining Leases/Permits

There are several categories of mining lease which may be granted by the Minister. They are mineral leases, coal leases, stone leases and oil leases. A maximum area size is accorded each with the exception of oil leases where the Minister has the discretion to determine size. A maximum lease term is set at 21 years but may be renewed. Leases may be granted on private or public land, including Crown Land.

Mining leases are taken out once the presence of an ore body has been established, as a result, for example, of surveys and sampling undertaken under an exploration licence.

The application procedure for a mining lease is as follows:

- (1) A requirement of the application is that the intending miner "mark out" the lease site according to the provisions outlined in the Mining Act 19 29 Section 4, consent to enter private property or Crown Land having been obtained from the owner and occupier or by permit from the Director of Mines.

A "Marking Out Notice" is then erected on the property.

- (2) The notice of marking-out must be lodged with the Registrar or Director of Mines within 3 days of the marking out unless the Director deems otherwise.
- (3) The application for a lease must then be lodged on the prescribed form, and accompanied by a fee, with the Registrar or Director within 14 days after the marking-out.

There is no requirement for advertisement of an application for a mining lease, the rationale being that the owner and occupier have notice of the application as a compensation agreement must be settled before the lease can be issued. In some cases the consent of the owner and occupier is required to mark out the land.

(4) Objections to the application may be made by:

Any person claiming any right to, or interest in, the land. Valid objections can only be made by owners, occupiers, or others claiming a financial interest in the land, including the holders of other mining or exploration licences.

Objections must be lodged with the Director within 28 days from the date of marking out the relevant mining lease/tenement. An objection must be accompanied by the prescribed fee and the objector must serve a copy of his objection on the applicant or upon each applicant if there is more than one within 2 days after lodging the objection.

The objection is then forwarded by the Director to the Mining Warden.

- (5) Objections are then heard by the Warden in the Mining Warden's Court. The Warden has the power to uphold an objection to a portion of the land and to allow the applicant to exclude this portion of the land. Objections may also be dismissed or upheld in total.
- (6) If Objections are dismissed, the lease is issued by the Minister with the consent of the Governor-in-Council.
- (7) An objector may also appeal against the Warden's decision to the Tasmanian Supreme Court on points of law.

The former Tasmanian Department of Mines (1989a) states that a mining lease is not the only authority required by a mine operator. Depending on the nature and extent of the operation, a Licence to Operate a Scheduled Premises may be required from the Director of Environmental Control, Department of Environment and Planning. This process contains its own objection and appeal system which will be discussed later.

A Planning Approval from the Municipal Council is also required in most cases and an objector can appeal a Council's decision to the Planning Appeal Board.

4.2.2.4 Profiles of two mining disputes

No disputes over the granting of mining leases were accessible to the author during the study. However several objections against applications for exploration licences were lodged. Two cases will now be examined.

The author attended court hearings and a public meeting, spoke with objectors and with the legal representatives of objectors and applicants and was in regular contact with the Registrar of Mines.

Case A

This was an objection against the granting of an application for an exploration licence. Both the applicant and the objector were public companies and both were legally represented.

As with other mining cases observed, the majority of court time was taken up with procedural matters. The objector cited the difficulties of serving notice of objection on the applicant who appeared somewhat evasive. This meant that the notice of objection could not be served within the two day statutory requirement, thus technically invalidating the objection.

The remainder of the hearing was spent determining the standing of the objector. The Warden made reference to precedent in *Stow v Mineral Holdings* 1977 14 ALR 497 and drew parallels with the apparent absence of standing of the objector in this case. It was determined that the objector had no "estate or interest" in the area subject of the decision. In handing down his decision, Warden Dockray (1989) said that the court "could only consider the technicalities not the merits" of the case. Substantive issues of the dispute were not and could not be considered.

A short adjournment in proceedings enabled the parties' legal representatives to discuss the matter, on the basis of which the objector reconsidered its position and the objection was withdrawn.

Some four hours were spent in court, and many more on briefings and the travel of the applicant's legal counsel from Hobart to the north of the State for the hearing.

Case B

Case B is an example of multiple jurisdictions pertaining in a land-use conflict which involved several objections against an application for an exploration licence on private land, public recreational land and Crown reserve, and the need for Planning Approval from the Municipal Council to enable an extractive industry to proceed in the area. The issue of jurisdictional superiority was not clear.

In this case, an individual with a number of current exploration licences and mining leases across the State applied for an exploration licence to survey and sample for mineral sands in an area known to be environmentally sensitive. The applicant was convinced from research and survey work already undertaken that resource prospects were good and he intended to apply for a mining lease on completion of his exploration.

Local residents were angry that preliminary work had been undertaken prior to the granting of a licence and considered both exploration and mining incompatible with the land capability and environmental qualities of the area. Research was undertaken into the impacts of sand mining in comparable areas interstate and a public meeting was called to consider further action.

Objections had been lodged by a number of local residents prior to the meeting in order to comply with statutory requirements, although Mines Division staff had advised that most persons lacked the standing to object.

There was also considerable scepticism among the objectors who were advised that if a licence were granted, an Environmental Impact Assessment would be required by the Department of Environment and Planning. Their scepticism focused on the fact that the EIS would be undertaken by a consultant commissioned by the applicant. Residents could nevertheless still object through the Environment Protection Appeal Board.

Also present at the meeting was the Mayor of the Municipality who advised that, contrary to opinion expressed by the Hobart City Council that "exploration is not a land-use", extractive industries were prohibited by the local municipality in the area in question. The Mayor further stated that no planning scheme had been finalised for the area, it was still under an Interim Order and residents had an opportunity to object to the granting of Planning Approval through the Planning Appeal Board.

The meeting decided to consider this avenue of objection, the Chairman of the meeting having publicly stated that "reliable sources" in the new government had assured him that mining would not be allowed to go ahead whether or not an exploration licence was granted.

The case was subsequently heard in the Warden's Court. No objectors appeared; several had withdrawn their objections, others had not. All objections were dismissed.

In handing down his decision to dismiss the remaining objectors, Hannon (1989: 3) made the following comments:

it is my view that the nature of the objections are such that they don't come within the jurisdiction of the Warden's Court.... confining the grounds of objection to the legal basis of the application and of the objections and to exclude from the consideration of the Warden any question of discretion on the general merits of the application or the objection.

Hannon went on to quote from *Stow v Mineral Holdings* 1977:

It is for the Minister to determine whether as a matter of policy it is desirable that the licence should be granted or refused. It is for him to weight up the relative merits of the economic advantages said to flow from this successful establishment of the mining operation and the interest of those concerned to preserve unchanged the environment of the particular area and other competing contentions as to what is in the public interest a suitable use to which the land may be properly put (1989: 3).

Hannon's concluding remarks were that:

It is not for this Court, or me sitting as Warden of Mines, to determine the wider ecological and environmental issues. Those matters are specifically under the Mining Act, reserved for the consideration

of the Minister.... but I think it's relevant for those persons (i.e. objectors) to be made aware of the limitations of the Warden's Court in determining applications of this nature (1989: 4).

It is understood that the exploration licence has now been granted and that an Environmental Impact Statement (EIS) has been requested by the Department of Environment and Planning. It is also understood that the case has yet to be heard by the Planning Appeal Board. It has apparently been scheduled for public hearing early 1990, which effectively delays the commencement of exploration activities until after that date.

Author's Comment

Both cases bring to notice the inadequacies and the inappropriateness of the judicial system for the resolution of disputes over exploration licences. The limitations of the legislation, the very restrictive rules of standing and the inflexibility of the court system drew critical comment from both Wardens. The vexed issue of public versus private rights is particularly apparent in Case B.

The cost to objectors, applicants and the taxpayer of legal representation and court time is also significant.

4.2.2.5 Issues and inadequacies

There are a number of inadequacies and inconsistencies in the present system which are acknowledged by the Mines Division (hence the review of the Act). They are as follows:

- Very restrictive rules of standing. Only those persons with "an estate or interest" in the land, that is, owners occupiers or others claiming a financial interest, have a right of objection. There are no third party rights of objection by, for example, a person whose land or enjoyment of their land is likely to be affected, to either an exploration licence or a mining lease.

Third party rights of objection to applications for a Licence to Operate and/or Planning Approval exist under the Environment Protection Act 1973 and the Local Government Act 1962 as indicated previously.

The Mines Division (Tasmania, Department of Mines 1989a) therefore argues that because third parties have rights of objection under other legislation, additional rights under the Mining Act may be unnecessary.

What is not clear, however, is which jurisdiction is superior. It could therefore be, that although third parties objected and/or appealed in other jurisdictions, the superiority of the Mining Act and the denial of the right of objection and appeal here, means that objections under other jurisdictions are a charade.

- There is no requirement for a mining lease application to be advertised, other than by "marking-out" on the property in question. This could be perceived by the public to be a clandestine way to avoid disclosure of the intention to mine, particularly as it is indicated by the Mines Division (Tasmania, Department of Mines 1989a) that mining for metallic minerals has tended to be confined to less populated regions of the State, where marking-out may not be noticed by the public. The perception of "hidden agendas" is further compounded by the absence of third party rights of objection.

On the other hand, public advertisements are required for applications for a Licence to Operate and for a Planning Approval in regions where extractive industry is a "discretionary use". This highlights the inconsistencies of principles and procedures among environmental decision making processes. It is no wonder that the public and industry get confused and frustrated. The Mines Division (Tasmania, Department of Mines 1989a: 7) advocates a single development licence to include mining, environmental and planning approvals to be incorporated in legislation.

- Public interest versus private rights. Landowners and occupiers of certain classes of private land are required to consent to the issue of a mining lease. It can therefore be argued that they effectively have a power of veto over mining.

There is an anomaly here between this requirement for a mining lease and that for an exploration licence where a licence holder may enter any class of private land after giving notice, but the owner or occupier has no statutory right to refuse entry (Tasmania,

Department of Mines 1989a): That is, a landowner does not have the power under the present legislation to exclude a licence holder from private land. The landowner must be served notice at least 3 days prior to entry. However this gives the landowner little time to respond, notwithstanding that in any event the landowner has no authority to refuse entry to the licence holder.

This raises the issue of private and public rights and the likelihood of disputes where these are perceived to be in conflict.

- Compensation difficulties can arise between the owner and the applicant. The Mining Act does not address these directly and it presumes that agreement is reached before the mining lease is granted. This is not always the case, a defect which is recognized by the Mines Division and which is to be rectified by legislation.

Compensation for damage is retrievable via the Warden's Court and the amount is determined by the Warden. The onus is on the landowner to seek redress from the explorer. Although the explorer is required to lodge a security deposit with the Director prior to entry onto private land, the landowner has no authority to refuse entry and in some cases it is possible that the security deposit may not cover damage done.

- The inadequacies of a court, such as the Mining Warden's Court, as a mechanism for hearing and determining objections on environmental matters, was outlined by Jeffrey (1986) and indicated previously. Its limitations are similar to those of the Magistrates' Court in which marine farm objections and appeals are determined.

4.3 Administrative objection and appeal systems

Administrative tribunals differ from their judicial counterparts in a number of ways. Their composition, processes and procedures are different. An administrative tribunal is perceived to have the advantages of relative informality of procedures, accessibility and it is not limited by rules of evidence.

Michael Jeffrey QC (1986) in a comparison of the merits of courts and tribunals in EDR noted that tribunals:

- had a statutory duty to consider public interest in a global sense (rather than private interest);
- were not limited by rules of evidence; for example, tribunal members can directly question a witness;
- interest was centred on obtaining the "best" information to arrive at the proper decision (rather than interest being centred on the adversarial relationship between objector and applicant);
- procedural modifications could be made at the tribunal's discretion; for example, site inspections and conferencing.

However, for all its advantages over the court system, the administrative tribunal also remains essentially adversarial in operation.

4.3.1 Environmental protection

Environmental protection is defined in the Vision Statement of the former Department of the Environments' *Annual Report 1987-88* as:

The protection, maintenance and improvement of the Tasmanian environment for the beneficial use of all people:

There are 3 strategic goals encapsulated in this statement:

- the understanding of environmental processes and their stress tolerance;
- the planning, development and implementation of strategies which minimize adverse effects on environmental quality;
- the co-ordination of environmental use through environmental planning, natural resource- conservation and pollution.

Historically, environmental protection in Tasmania has focused on environmental monitoring and pollution control and although the development of the Environment Protection Act 1973 (Tas.) broadened

its mandate and functions, it remains a relatively recent innovation in both a legislative and an administrative sense.

As acknowledged by Brown (1988: 2), the Act requests a negative response to any advertised development in that all intending developers must apply for a licence to operate and/or alter a scheduled premises. Scheduled premises are defined in Schedule I of the Act to include ore processing works; mines and quarries; chemical and gas works; oil refineries; food processing plants; pulp, paper and woodchip mills; abattoirs; sewage treatment works; refuse disposal sites; saw mills, and others.

One of the innovations of the "new" 1973 Act was the creation of the Environment Protection Appeal Board (EPAB) to hear and determine appeals against the Director's decision to either grant or refuse a Licence to Operate a Scheduled Premises.

4.3.1.1 Environment Protection Appeal Board

The Environment Protection Appeal Board (EPAB) is an independent administrative tribunal of three persons. It is chaired by a person with legal qualifications, one person must be a graduate in a branch of science, engineering or medicine with experience in environmental control or management if possible, and the third must have tertiary qualifications in a branch of science or engineering and at least five years experience in a responsible position associated with process operations in industry. There are also support substitutes with similar qualifications for all members.

The EPAB public hearing process is more informal than those of the Magistrate's or Warden's Court. The Chairman of the EPAB may vary procedures at his discretion to question witnesses directly or to undertake site inspections as required.

The Chairman of the EPAB also has the power to convene a preliminary hearing to determine the grounds of appeal and to ascertain the particulars of nominated witnesses. The Chairman then prepares a report specifying the matters to be determined, the estimated hearing times and that proofs of evidence have been exchanged.

Having conducted a preliminary hearing, the Chairman then presides

over the public hearing as Chairman of the full tribunal.

4.3.1.2 Environmental protection approval process

As with marine farm and mining operations, there are a number of key stages in the environmental protection approval process.

- (i) Application for a licence to operate a scheduled premises. A person seeking a licence to operate may apply to the Director of Environmental Control who may grant the licence conditionally or unconditionally, or refuse to grant it.

The applicant must specify the nature and situation of the premises and give the Director such plans, specifications and descriptions of emissions as the Director requires. An evaluation of the level of environmental assessment required is then made by the Department of Environment and Planning at the request of the Director.

The application requirement applies both to new developments and to existing premises where there is a change of operations, a licence renewal or a licence transfer.

- (ii) Advertisement of licence application. The applicant must then "issue notice on all persons who may be affected", usually by an advertisement for two consecutive weeks in a local newspaper.
- (iii) Objections against a licence application may be lodged "with the Director by any person" who objects to an application within 30 days of the advertisement. The onus is on the objector to prove that he/she will be affected.
- (iv) Appeals against the Director's decision to grant or renew or refuse a licence must be lodged with the Environment Protection Appeal Board within 14 days of the Director's decision, the Director having notified the applicant and objectors simultaneously.

An appeal may only be lodged by persons who originally objected and who reside or carry on business in an area likely to be adversely affected by pollution from the licensed premises. Original objectors

can intervene in any appeal lodged by the applicant. The EPAB also has discretion to allow intervention by persons who could have, but did not, lodge an objection to the original application.

A fee of \$250 as security against costs has to be deposited with the EPAB at the time of lodgement of appeal.

- (v) A public hearing is then convened by the EPAB.

4.3.1.3 Profile of an Environmental Protection Dispute

The profile of this dispute was obtained from attendance at the EPAB hearing and from discussions with the objectors and their legal representative, Environment Protection officers and a representative of the applicant. This case involved an application by a company to expand its quarry operations. Since the quarry was first used, urban encroachment had increased, and private housing was now being constructed close to the boundary of the premises.

The case was heard by the EPAB comprising a Chairman and two persons with engineering qualifications. There was no preliminary conference and the hearing took 2½ days. Both the applicant and the appellants were legally represented.

Considerable time (4 hours) was spent in determination of the threshold matters of grounds of appeal and the particulars of the appellants. There was also the question of appellant access to the Environmental Impact Statement (EIS) which had been commissioned by the applicant at the request of the former Department of Environment. The end result was that water pollution, and traffic hazards caused by increased traffic on unsealed roads adjacent to the quarry and nearby housing were dismissed as grounds of appeal by the EPAB. Neither were appellants allowed access to the EIS, "commercial in confidence" being cited in the defence against access in the public interest. The EIS was then admitted as evidence in support of the applicant's case.

The EPAB then adjourned to consider the EIS. It also decided that a site inspection was required the following day.

In spite of a lower degree of formality than in the judicial system, the

hearing remained noticeably adversarial in operation, all parties and in particular less articulate appellants appearing very nervous. The adversarial nature of the hearing was compounded by the presence of legal representatives who examined and cross-examined in the manner of the courts.

All parties were critical of the Department of Environment's procedures, citing numerous examples of inconsistency and contradiction in advice given, information requested and the monitoring of quarry operations, including breaches of licence conditions and the lodgment of quarry returns. The result was that the appeals were dismissed and the quarry was able to proceed with its expansion. The appellant's major concerns of water pollution, noise, dust and traffic hazards were not addressed. The former Department of Environment was advised to tighten up its monitoring and investigation processes.

4.3.1.4 Issues and inadequacies

The Environment Protection Act 1973 (Tas.) is now outdated and a complete review is planned for 1990.

Since the introduction of the Act in 1973, environmental protection has become increasingly complex and contentious. As a result a three level application assessment process has now been introduced. In 1988, a two level process was introduced to cater for small and large scale developments and operations. However the proposed construction of a Kraft pulpmill at Wesley Vale in early 1989 promoted the introduction of an unofficial third level of assessment.

These levels of assessment are administered by the Department of Environment and Planning according to the nature and extent of the environmental problems likely to arise from the proposed development.

Level 1 Assessments are for small developments unlikely to cause significant environmental problems and the procedure is straightforward.

It involves a site inspection and the completion of a Development Proposal. The usual objection and appeal processes then apply.

Level 2 Assessments are for developments likely to cause significant

environmental problems. A Development Proposal and a draft Environmental Management Plan (EMP) are both required. The applicant is required to prepare both documents in consultation with the Department. These are then made available for public comment prior to any decision by the Director.

The usual objection and appeal processes then apply.

Level 3 Assessments are for particularly complex and contentious developments such as the Wesley Vale Pulp Mill, Huon Forest Products Woodchip mill, and the Light Weight Coated Paper (LWC) project proposed by Australian Newsprint Mills.

In cases such as these, an even more rigorous application assessment process is required. There are no proforma public guidelines available, the requirements for each development being determined by the Department on a case-by case basis. For example, developers may be required to prepare an Environmental Impact Statement and Management Plan (EISMP) which is then made available for public comment and objection. The period for formal Objections may also be extended from 30 days to 6 weeks as is proposed, in the case of the LWC project (Department of Environment and Planning 1989: 2).

Another innovation in the LWC application process is the intention to seek public input into the development of draft guidelines ("scoping") for the EIS.

These Level 3 modifications to the application process, while well intentioned, could be criticized as being inequitable and inconsistent by both applicants and objectors.

- Many of the 1973 definitions in the Act are too narrow in 1989. For example, "environment" means land, water and atmosphere of the earth but "land" does not include soil; rather it refers to buildings, structures and parts thereof. The Act also makes no allowance for social impacts, unlike the *Commonwealth Environment Protection (Impact of Proposals) Act 1974* or the *Western Australian Environmental Protection Act (1986)*.

Given increased public concern, the profile of social impact and

the need for comprehensive social impact assessment in Level 2 and Level 3 developments in particular, the current Act is totally inadequate.

- This inadequacy in the evaluation of social impact issues is also reflected in the composition of the EPAB and the qualifications of its members as lawyers, engineers, medical practitioners or scientists. There is no capacity for social issue/impact analysis nor has it the jurisdiction to consider such under the Act as it stands at present.

Similarly, there is no capacity in the EPAB for the evaluation of economic impact issues of significance to the public or the state.

- While there is an opportunity for a preliminary hearing, its use is at the Chairman's discretion. The use of a preliminary hearing in the dispute profiled would have hastened the hearing process by eliminating time spent on threshold issues. A shorter hearing time would also have meant less costs for all the parties.

That the Chairman may then go on to chair the appeal hearing is of concern. The question this may raise in the minds of some parties is that natural justice may be denied if, for example, the Chairman is perceived to be biased as a result of his chairing the preliminary hearing. In New South Wales, Commissioners of Inquiry do not hear an appeal if they have previously acted as a mediator in that same dispute (NSW Commissions of Inquiry for Environment and Planning 1988).

- The adversarial nature of the hearing process, together with the inadequacies of the Act and of the EPAB composition, prevent the resolution of the substantive issues of disputes, such as those of the traffic hazards, and water and noise pollution in the case cited. It is likely that these issues will re-emerge as zoning issues in land-use planning, as environment protection jurisdiction and processes were unable to either address or resolve them.

4.3.2 Land-use planning

Land-use planning and land management are at a watershed in Tasmania. There is widespread recognition of the need for an integrated land-use

strategy for the state with land capability assessment and land conservation as the principles underpinning such an approach (Sandford 1989c). Land capability assessment is in its infancy in Tasmania and land conservation is noticeably absent, Tasmania being the only Australian state without land conservation legislation.

The need for a land-use strategy has been acknowledged by Mant 1989, the Tasmanian Legislative Council's public land-use inquiry 1989 and reviews of local government, mining, and environment protection legislation which are either already underway or are imminent. The Labor-Green Accord partners are also committed to the development of comprehensive management plans for World Heritage areas, water use, coastal management, and forests and forest industry strategies, all of which impact directly on land-use planning and land management.

There are also major problems with outdated planning legislation. Although legislation on land-use planning has been debated for some 20 years, as *Australian Planner* (1988) notes, there has been little fundamental change. Land-use planning suffers from an isolationist rather than an integrated approach to planning and there has been no coordinated strategy for land-use planning and the resolution of land-use disputes.

The significance of planning at the State level is placed in perspective when it is realized that some 60% of the land area of Tasmania is within the Crown Estate (*Australian Planner* 1988: 1).

A major factor affecting planning control is land ownership. Only privately owned land and private development on Crown land are subject to planning control. As some 60.5 percent of the State's land is administered by the Government with only 39.5 percent being privately owned, this raises questions of planning coordination and highlights the need for State Government commitment to the development of an integrated land-use planning and management strategy for the State.

As noted in *Australian Planner*:

land-use planning displays a varied profile. There is a well developed system for statutory planning based on local government planning schemes with clear processes for public involvement, but planning at the State and regional levels is less well developed (*Australian Planner* 1988: 1).

McNeill (1988: 11) explains that planning in Tasmania is enshrined under the title 'Town and Country Planning', and was developed on the English model, which has proved inappropriate for Australian patterns of building and development. He nevertheless states:

Planning in Tasmania became and still largely functions as, local government development control mainly exercised through land-use zoning (McNeill 1988: 11).

Under the *Town and Country Planning Act 1944 (Tas.)* local government became the focus for planning within the State. The Act established an administrative framework of a Town and Country Planning Commission presided over by a Commissioner for Town and Country Planning. In 1958 the Act was amended to provide for the development of regional land-use plans (Master Plans) by regional organizations comprised largely of local government representatives (Master Planning Authorities) (Tyler 1988: 13).

In 1962 the Town and Country Planning Act was incorporated into a revised Local Government Act and as Tyler (1988) indicates, subsequent amendments to the Act have included:

- the establishment of a Planning Appeal Board;
- the requirement for a municipality to have a planning scheme or an interim order before it can exercise planning controls; and
- a provision which requires a council to obtain the Commissioner's consent to a municipality's approval of any subdivision proposal, before that approval is effective.

The Commissioner acknowledges anomalies and inconsistencies in the legislation which is now outdated and has not kept pace with Tasmania's rate and direction of development (Tyler 1988: 13). This is further supported by Mant (1981) who, in his *Report on Land Management in Tasmania*, described land management in the State as fragmented and administered by a number of specialist agencies at the expense of the land resource.

The issue of planned multiple use is a difficult one which is compounded by the legislative and administrative inadequacies mentioned. It frequently results in conflict between values of land conservation and

land exploitation, which in turn reflects the eternal resource management dilemma facing Tasmania.

According to Birkeland-Corro (1988b), land-use planning involves the fundamental question of public choice regarding the extraction, distribution, use, pollution or depletion of a resource, the land. However public planning is given little thought. Birkeland-Corro states, "we do not plan: instead we 'manage conflict' surrounding planning issues. And, we do not do that very well" (Birkeland-Corro 1988b: 8).

4.3.2.1 Planning Appeal Board

The Planning Appeal Board (PAB) is an independent administrative tribunal responsible for the management of land-use conflict. It is established under the *Local Government Act 1962 (Tas.)* and hears and determines appeals against the various planning decisions made by Municipal Councils pursuant to a statutory planning scheme or an approved Interim Order (Tasmania, Commissioner for Town and Country Planning 1986: 1).

A Constituted Board may comprise a "full" Board of three members or it may be a single member Board. Normally the Board sits as a three person tribunal so as to maximize the expertise available (Pitt 1988: 16). The composition of the Board is at the discretion of the Chairman. Of the 3 members, the Chairman and Deputy Chairman are required to have legal qualifications; one member must be an architect or engineer; and the third member must have planning experience.

The PAB can inform itself as it sees fit. It usually inspects sites and it has the power to hear any person it wishes, in addition to the parties.

The procedure is at the discretion of the Board, and it is as informal as circumstances permit, although the basic adversarial court structure of examination and cross examination is adopted (Pitt 1988: 16).

The Board also has the power to conduct a pre-hearing compulsory conference. As Pitt comments, the Board member conducting the compulsory conference does not sit upon any subsequent hearing of that appeal (Pitt 1988: 16). This is in contrast with the position adopted by the Environment Protection Appeal Board.

4.3.2.2 Planning approval process

According to Pitt (1988: 15), under the Act the Commissioner for Town and Country Planning may require any municipality to prepare a planning scheme within a specified time. Where there is an unfulfilled requirement to prepare a scheme, or a scheme is in the course of preparation, a municipality may make an interim order. Since 1986 no municipality has had the power to refuse, grant conditionally or prohibit any development other than under a scheme or interim order.

Before a person is able to carry out a development, it is necessary to establish if an application for planning approval is required. This is determined by examining the Municipal Planning Scheme or Interim Order. If the Municipality has neither a Planning Scheme nor an Interim Order, then no planning approval is required.

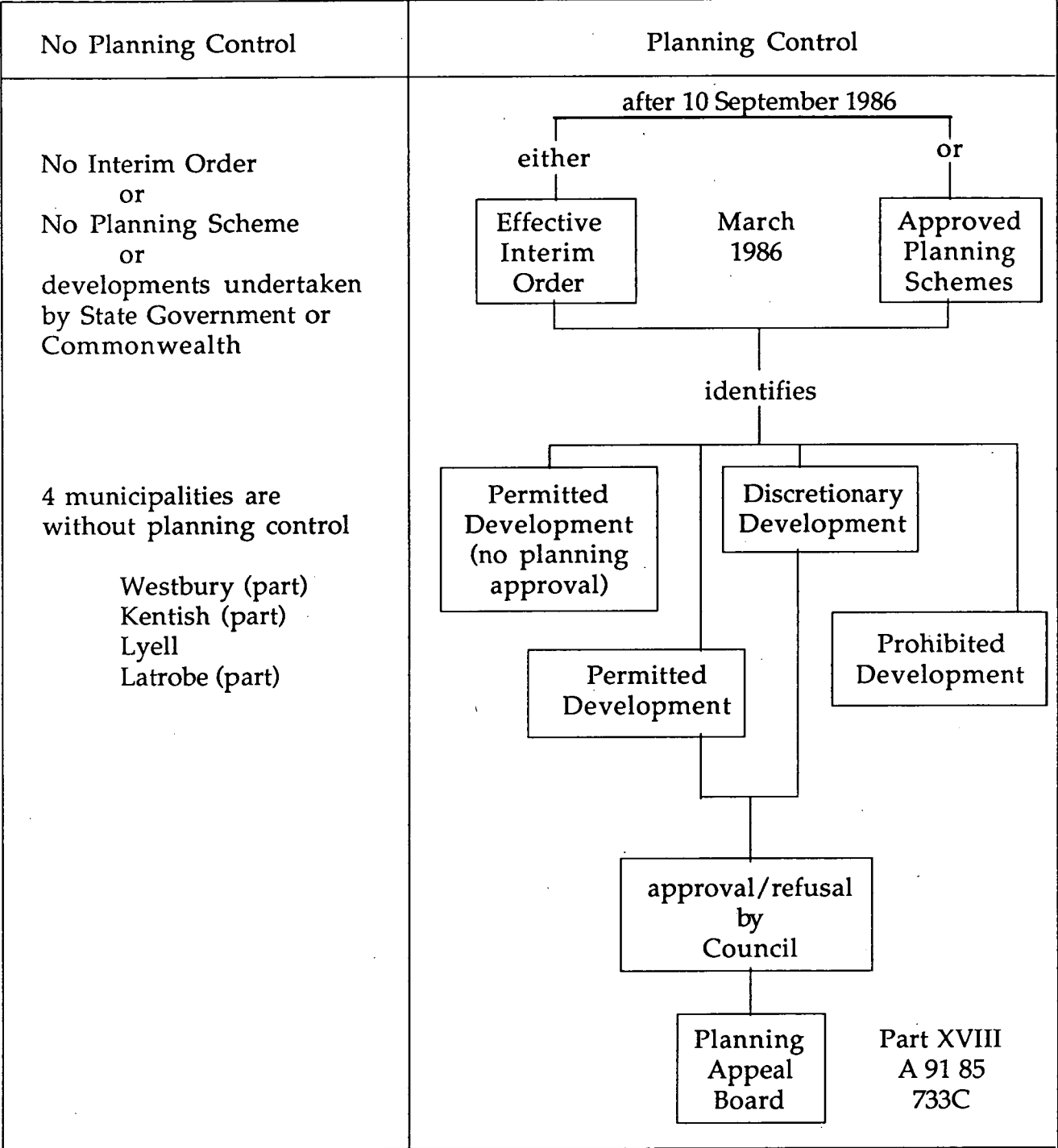
Both Planning Schemes and Interim Orders designate land developments and subdivisions by local government authorities into three broad categories:

- prohibited development - the Authority cannot allow certain specific usage;
- permitted development -
 - (a) without the need for planning approval
 - (b) with restrictions/conditions applied;
- discretionary development - the authority may exercise discretion to refuse or permit the use of land with or without restrictions or conditions.

The flow chart prepared by Lawrence (1988) illustrates the planning approval process (Figure 3). At September 1988, some 92 per cent of the State was covered by either Interim Orders or Planning Schemes.

FIGURE 3

The Planning Process
Local Government Act 1962
Part XVIII



Source: Lawrence (1988).

However, land administered by the Government (Federal or State), although covered by a Planning Scheme, is not controlled by the Local Government Act and individual State government agencies are not bound by the provisions of the Scheme (Lawrence 1988).

If developments are proposed on land designated prohibited use, the Council has no choice but to refuse the application. There are no appeal provisions for this category of development.

- (i) Applications for development on land designated permitted use may be approved or refused by the Council. The Council may also attach conditions to the approval.

The applicant can appeal against the conditions attached to such an approval.

Third parties cannot appeal this category of applications.

- (ii) Applications for development on land designated discretionary use are required to undergo a different process which involves opportunities for public comment.

Applications must be advertised in a local daily newspaper and persons wishing to object may do so.

- (iii) Objections (representations) must be lodged with Council within 14 days from the date of advertisement.

Council then makes a decision on the application. If objections have been received, Council is required to advertise its decision. If no objections have been received an advertisement is not required.

Only an applicant or a person who has lodged an objection during the 14 day period can appeal to the Planning Appeal Board against the Council's decision.

An applicant can appeal against either the refusal of a planning approval or the conditions of approval.

A person who has lodged an objection with Council can appeal the granting of a planning approval.

- (iv) A notice of appeal is lodged with the Office of the Commissioner for Town and Country Planning within 14 days of the Council's advertising its decision, or, if the decision is not required to be advertised, within 14 days of service of a notice of the decision on the person(s) who instituted the appeal.

There can also be appeals against delays by Councils in considering development applications. In this case an applicant may appeal against the failure of a Council to decide on an application after the expiry of 42 days (or longer if agreed between the applicant and Council) from the date the Council was notified of the advertisement of the application.

- (v) A hearing is then convened by the Planning Appeal Board. Appeal hearings are open to the public and observers and the media may attend. Parties to an appeal may elect to be legally represented. This is frequently the case although representation is also provided by planning consultants alone.

4.3.2.3 Profile of a planning dispute

One case study of a planning dispute was available to the author. Discussions were held with the objectors and the applicant and the hearing was attended. It was an appeal by third parties against the decision of a Council to approve the construction of strata title home units in an area that had traditionally been private homes.

The appellants were concerned that the construction of units would create additional traffic and noise problems, would be visually offensive and incompatible with local architecture, and might adversely affect the market values of adjacent properties.

The case took half a day.

The process was adversarial and sequential with the evidence being presented by the applicant, the Council, and finally the appellant. The applicant and appellant were legally represented and a Planner presented

the Council's case.

The appeal was dismissed. The PAB decided that the development was unlikely to cause appreciable traffic problems, that noise could be controlled by other regulations and public authorities, that the proposed construction design was somewhat similar to other nearby residences, and that approval conditions would ensure compliance.

4.3.2.4 Issues and inadequacies

- The Local Government Act 1962 like much resource management legislation, is now out of date. There have been significant changes in land-use planning since 1962, in response to increasing community concern about the utilisation of land. The issue of rural subdivision and urban encroachment into traditional agricultural areas is of concern to organizations such as the Tasmanian Farmers and Graziers Association (TFGA), which advocates the need for subdivision to have regard to land capability assessment, and the need for provision of appeals to a "Land Court" (TFGA 1989). At the other end of the community spectrum a number of conservation groups, planners and individuals have expressed concern about planning approval decisions taken by the Hobart City Council which threaten the loss of Hobart's historical character. Proposed development at Sullivan's Cove is one such example.
- Land ownership is a key issue. The exemption of the Crown from planning control under the Act is a major inadequacy in land-use planning, particularly as 60.5 per cent of the State's land resource is affected. Land-use legislation, be it land conservation or planning, must have the power to bind the Crown. Not to do so militates against sound land-use planning and is potentially a contributing factor to land-use conflict.
- Third party rights of appeal are restricted to those persons who have made representations/objections to Council against discretionary developments only. There are no third party rights of appeal against permitted developments. Some other States have removed third party rights completely, however Pitt argues in favour of retention if not extension of third party rights as:

It is unjust for a person's enjoyment of their land to be substantially adversely affected by a development and yet for them to have no right of appeal (Pitt 1988: 17).

Third party rights, or lack of, may well be a focus for the future as concern about the need for sustainable land-use management gains momentum. Agricultural industry organizations have already expressed dissatisfaction with rural subdivision processes and have argued the need for Right-to-Farm legislation. It is likely that, as a political force in Tasmania, it will lobby for third party rights to be extended.

- Pre-hearing conferencing could be more widely used as a means of either resolving disputes before hearing or as a means of reducing the number of issues to be addressed at a hearing and thus time taken and costs accrued. It is of concern to note that of 109 appeals lodged in 1986-87, 78 were heard but only 3 compulsory conferences were conducted (Pitt 1988: 15). There is no explanation given for this and it seems further examination may be in order.
- Fast-track legislation has been used by Government to exempt specific developments from the planning approval and appeal process. The Electrona silicon development and the construction of the multi-storey Sheraton Hotel on Hobart's historic waterfront are two examples. The argument put was that such developments were in the public (and the State's) interest, and necessary for economic and employment reasons.

To bypass the planning process in this manner, in spite of having the power to do so, provokes land-use and community conflict whereas the objective of the planning process and the Planning Appeal Board is to resolve conflict in the public interest.

4.3.3 Forestry

Tasmania is the most forested of the Australian states with forests covering almost 42 per cent of the island. Some 13 per cent of the State is designated as State reserves and 14 per cent as conservation areas under the sole control of the Department of Parks, Wildlife and Heritage (Rolley 1988:

4).

Forest industries constitute the State's single largest source of export revenue and they are also major employers, although conservationists argue that increasing automation in both the forests and the mills will see a substantial downturn in employment opportunities in the near future.

Industry practices have also been a focus of large-scale and sometimes violent disputes, and of numerous inquiries (such as the Lemonthyme and Southern Forests Commission of Inquiry, 1988).

Legislation for planning the management of forests is set out in the *Forestry Act 1920* (and subsequent amendments such as those of 1975, 1977 and 1980) and the *Forest Practices Act 1985*. These Acts are supported by the *National Parks and Wildlife Act 1970* and the *Environment Protection Act 1973*, (Rolley 1988).

According to Rolley, the *Forestry Act 1920* provides for a Forestry Department to have exclusive control and management of all matters of forest policy in state forests and timber reserves with the objective of providing for better management and protection of forests. The 1975 amendment set aside land within a State forest as a Forest Reserve and the 1977 amendment provided for a Private Forestry Council, a Private Forest Division, and a Commissioner with statutory responsibilities for private forests.

In 1976, a public inquiry into Private Forestry Development in Tasmania recommended legislation which would focus specifically on initiatives required to improve the practice of forestry and provide for forest conservation on both public and private forest lands. This became the *Forest Practices Act 1985* and it covers all forests where commercial wood production is planned, including forests on the Register of the National Estate.

The Forest Practices Act seeks to achieve an integrated approach to forest management. Key features of the Act and components in the integrated forest management strategy are:

- the creation of Private Timber Reserves;

- a requirement for timber harvesting plans;
- the implementation of a Forest Practices Code;
- the constitution of a Forest Practices Tribunal.

The Act binds the Crown and is superior to the *Local Government Act 1962*.

The Forest Practices Act applies only to forest areas designated for timber production. "It does not provide, nor was it intended to provide, a legislative mechanism to resolve disputes between differing groups on fundamental and broader scale land-use planning" (Rolley 1988: 11).

4.3.3.1 Forest Practices Tribunal

The Forest Practices Tribunal is an independent administrative tribunal, the objective of which is to adjudicate conflicts that may arise in the application of the Act between the parties most directly affected. It constitutes three persons, one of whom is legally qualified and with a minimum of five years experience, one being a person with a sound and practical knowledge of forestry operations, and the third being a person qualified in land and forest management.

The Tribunal may inform itself on any matter as it thinks fit, procedures are flexible, site inspections are undertaken, and appeal hearings often occur on site.

The hearings are not public, there are no third party rights of appeal, and parties are not entitled to legal representation.

4.3.3.2 Forestry approvals processes

- (i) An application for land to be declared a private timber reserve may be made to the Forestry Commission by any person who wishes to have his land designated as such.
- (ii) An advertisement of the particulars of the application is published in the State's daily newspapers by the Commission which also

sends a copy of the notice to the local authority exercising jurisdiction over the land and the local authority exercising jurisdiction over any adjacent land.

- (iii) Objections may be lodged with the Commission by any prescribed person by a date specified as being not less than 28 days after the advertisement.

A "prescribed person" means:

- (a) a local authority exercising jurisdiction over the land, or part of the land to which the application relates, or over any land adjacent to that land;
- (b) a State authority; or
- (c) a person who has a legal or equitable interest in the land, or the timber on the land, to which the application relates.

An objector must specify the grounds of objection and must also serve a copy of the objection on the applicant by the date specified in the advertised notice.

- (iv) The Commission may then grant or refuse the application, having regard to Objections received. If an application is granted, the Commission notifies objectors accordingly.
- (v) An appeal to the Forest Practices Tribunal may be made by a person whose application was refused by the Commission and where the Commission grants an application for a private timber reserve, by a person who has lodged an objection.

Appeals must be lodged within 14 days of receipt of notification of the Commission's decision.

The Registrar of the Forest Practices Tribunal is then required to serve a copy of the notice of appeal on each person who lodged an objection (in the case of an appeal by the applicant) and publish the notice of appeal in the daily newspaper circulating in the area in which the intended reserve is located.

There is provision for any person who objected to intervene in specified circumstances.

- (vi) Following a hearing the Commission recommends to the Governor that the land be declared a private timber reserve. Notification of the decision is published in the *Gazette*.

There is provision for compensation in some circumstances in the event of dismissal of an appeal.

Once land has been declared a private timber reserve, it can be used only in accordance with the Forest Practices Code. If this ceases to be the case, the Commission investigates relocation of that reserve. The owner of a reserve may appeal such a decision to the Tribunal.

According to a senior manager in the Forestry Commission (pers. com. 1989), preliminary hearings involving objectors and the applicant are often held, although there is no specific provision for this in the Act. He stated that these were only held when the Commission intended to refuse an application, and only 2 out of 80 applications had been refused as at June 1989. There had also been no appeals by objectors to the Tribunal.

He also stated that the Act had been deliberately drafted to limit the number of objectors, to inhibit opportunities for community consultation and input, and to deny third party rights of appeal.

Timber Harvesting Plan approval process

The Forest Practices Code sets out the standards that apply to forest operations, of which the Timber Harvesting Plan is a part. The Timber Harvesting Plan is the key to sound forest practice (Forestry Commission 1988) and is a plan of action drawn up by those involved in the operation - the landowner, the timber processor and the contractor. It must then be approved by the Forest Practices Officer, an employee of the Forestry Commission.

A timber harvesting plan is required for both Crown land and private property timber harvesting operations. There are some exemptions for small operations that are not considered to be environmentally sensitive.

A timber processor is deemed guilty of an offence and can be convicted and fined up to \$15,000 if he/she acquires or purchases timber for sale from land in respect of which there is no timber harvesting plan at the time of harvesting.

- (i) An application for a timber harvesting plan may be made to the Forestry Commission by any person intending to undertake timber harvesting. It must be signed by the landowner, the timber processor and the contractor(s).
- (ii) The plan is then submitted to the Forest Practices Officer for approval.

The Forest Practices Officer may approve or ask for further information, amend or vary, or refuse the Plan.

- (iii) An appeal may be lodged with the Tribunal by any person who has applied for approval of a timber harvesting plan. Appeals can be in relation to a Commission decision to refuse to approve a plan, to amend or vary a plan, to refuse an applicant's proposed amendment, or a decision to amend or vary an applicant's amendment (Forestry Commission 1988: 9).

There are no third party rights of appeal.

- (iv) A hearing is then convened by the Forest Practices Tribunal and the Tribunal's decision is final.

4.3.3.3 Profile of a forestry dispute

The Forestry Commission stated that it was unable to allow the author to observe a Tribunal hearing as they were private hearings and that the consent of all parties and the Tribunal was required. In spite of follow up by the author, such an opportunity was not offered.

It should also be noted that, as stated previously, only 2 out of 80 applications for private timber reserves were refused to June 1989.

4.3.3.4 Issues and inadequacies

The Forest Practices Act 1985 raises a number of issues. As the most recent resource management legislation examined, it is reasonable to expect that it would demonstrate a responsiveness to increased community concern about environmental impacts and the need for improved environmental decision making and dispute resolution systems. That it does not do so is of interest for the following reasons:

- The issue of public interest v private rights comes into sharp relief in the forestry operations approval processes. The Act and its processes clearly support commercial timber production as a private right. There is no provision for public interest in the management of the private forestry resource be it on Crown or private land, the denial of third party rights of objection and appeal being an example.
- There are no third party rights of objection or appeal, Objections being restricted to a very narrow category of "prescribed persons" in the case of private timber resources, and to landowners, timber processor and contractors who are parties to a specific timber harvesting plan in the case of approval of timber harvesting plans.

These restrictions on the standing of objectors are contrary to prevailing judicial opinion and trends to extend objections and appeal rights and their jurisdictions to include a wider class of persons. Such restrictions, while supporting an objective of timber production and forest management as determined by the Forestry Commission, may be perceived as arrogant and obstructive by the community, and in particular by those with an ecocentric perspective. It could also be argued that, in making decisions in the public interest, natural justice is denied those who wish to object on grounds other than timber productivity. For example, equal weight does not appear to be awarded to forest conservation, as distinct from forest production.

A Forestry Commission defence that conservation and land-use management is adequately catered for by other government departments such as the Departments of Environment and Planning and Parks, Wildlife and Heritage, lacks substance when it is noted that the Forest Practices Act binds the Crown and is superior to the Local Government Act and the Environment Protection Act.

- Tribunal hearings are in effect, private hearings, restricted to tribunal members, the applicant(s) and objector(s). Observers, and the media are not permitted, unlike the EPAB and PAB hearings, unless the permission of all parties is first obtained. Rightly or wrongly, this adds to public perceptions of collusion between the Forestry Commission and the forest industries.
- The Act binds the Crown and in most cases it is the superior jurisdiction. This means it can override lesser legislation, as indicated. There are advantages and disadvantages here. On the one hand, the Crown is bound to observe sound forest practices. On the other hand, the Commission is in a position of strength, and it is possible for decisions based on a forest development or timber production ethos to override the need for preservation and conservation.
- The Forests Practices Act has apparently failed to take into account the weight of public opinion in support of third party objection and appeal rights and public interest issues. However, given the statement made to the author by a senior Forestry Commission Manager, as mentioned, it would seem that the Commission has in fact taken very careful note of public opinion. A sceptic may be excused for thinking it was a case of attack being the best form of defence.

It should not be forgotten however, that at the time this Act was being compiled, from 1976 to 1987 when it was proclaimed, the Tasmanian forests had been battlegrounds for long and bitter conflicts between those in support of timber production and those concerned with forest conservation. It is therefore not surprising that the Forest Practices Act constitutes a defensive reaction to public criticism of forest practices by limiting opportunities for third party intervention in the approvals processes while endeavouring to ensure that improved forest practices and standards are developed and enforced.

4.4 A comparison of EDR systems

An analysis of the five systems previously described reveals a number of commonalities of process, procedure, issues and inadequacies.

There are distinct similarities across the approvals processes, with all systems using a staged process or approach to environmental decision-making and dispute resolution. The stages identified are an application to develop, a provision for objections against the application, and a right to appeal the decision to grant or refuse the application. This is where the appeal process similarities cease.

There are wide ranging differences among systems in their requirements for the application to be advertised and if so, by whom - applicant or statutory authority. There are even anomalies within systems, as is the case with mining. There are major differences in the rules of standing, third party rights being the exception rather than the rule, and although resource management and environmental decision making are generally assumed to be in the public interest, private rights appear to dominate the agendas of most of these systems, promoting a perception of resource development rather than resource conservation.

Similarities exist among the hearing processes also. With the exception of the forestry appeal hearings, all are public, and all are adversarial. With the exception of forestry again, legal representation is optional, but is used in most cases, as objectors and appellants consider they are otherwise disadvantaged.

The judicial/court based systems are definitely more inflexible and procedurally oriented. Their inability to deal with environmental issues has been acknowledged by Magistrates Hannon, Bryan and Dockray. There is undoubtedly a preference for administrative tribunals as a more appropriate forum for environmental dispute resolution.

Nevertheless, there are differences in operations and procedures among the tribunals. The composition of the tribunal/board varies, as does its power to sit as a tribunal/board of one person. No tribunals/boards have a social impact analysis capacity among their membership, in spite of increasing public demand for social impact assessment. Their capacity for economic impact assessment is also questionable. Given the need for "rounded" decisions in environmental dispute resolution, the author considers that all the tribunals may well be deficient in this regard, and that a case exists to broaden their composition. Comparable problems have already been acknowledged by some members of the judiciary who

consider that legally qualified persons are often unable to comprehensively and accurately determine wide ranging environmental matters.

There are also differences in the extent to which pre-hearing conferences are used. Indications are that they are underutilised. The value of compulsory conferences and the Chairing of a subsequent hearing by the conference Chairman are also questioned, and these issues will be addressed in the following chapter.

There seems to be a consensus that there is more procedural flexibility in administrative tribunals than there is in courts. However they remain adversarial in operation and in spite of attempts by the tribunal to maximize informality, objectors, appellants and applicants interviewed all indicated that they felt intimidated by the adversarial nature of the hearing process.

Additional comments by parties about the hearing process were that it was very costly and time consuming and that they lost control of their case to lawyers. A number also commented that the case presented by the lawyers bore little resemblance to the original objection or appeal. However the parties who made these comments felt unable to present their own case in a combative legal arena. The anomalies and differences discussed above are illustrated in Figure 4.

Although similarities exist among the environmental decision making and dispute resolution systems examined, many differences and inconsistencies remain. The end result is confusion and frustration for all parties.

For the developer, it may be necessary to lodge applications in several jurisdictions which have to be negotiated either concurrently or sequentially. This information is not readily available in many cases and with the exception of the Forest Practices Act, there is no clear indication as to which legislation has priority. It is time consuming and may cost the developer loss of commercial advantage.

For the public, it is a maze of misinformation and inconsistent procedures apparently designed to restrict public access and input to environmental decision making - a perception of private rights at the expense of public interest.

FIGURE 4

Comparison of EDR Systems in Tasmania

Jurisdiction	EDR Mode	Approval Process	Issues and Inadequacies
Marine Farms Sea Fisheries Act 1959 + amendments)	Magistrates Court	<ul style="list-style-type: none"> - Application to Director - Advertisement by Minister - Objections to applications to Minister - Decision by Minister - Objections and appeal against decision to Magistrates Court - Public hearing at Magistrates Court - Right to appeal Magistrates decision to Supreme Court 	<ul style="list-style-type: none"> - Restrictive rules of standing if <u>lease</u> (Marine Board; Local Government; <u>use</u> of waters;) if <u>permit</u> (Marine Board; livelihood affected - no third party rights) - Limited grounds of appeal - No provision for pre-hearing conferencing - Procedural inflexibility - no site inspections + limited by rules of evidence - Adversarial - intimidating and costly - Private (commercial) rights v public interest - No clear channels of communication between public and Department
Mining (Mining Act 1929 + amendments)	Mining Wardens Court	<p>(A) <u>Exploration Licence</u></p> <ul style="list-style-type: none"> - Application to Director - Advertisement by Applicant - Objections to application to the Warden's Court - Public hearing at Wardens Court - Right to appeal Warden's decision to Supreme Court <p>(B) <u>Mining Lease</u></p> <ul style="list-style-type: none"> - Applicant "marks-out" lease site - Application for lease (no advertisement required) - Objections to application to Director forwarded to Warden's Court - Public hearing at Warden's Court - Appeal to Supreme Court re. Warden's Decision 	<ul style="list-style-type: none"> - Legislation out of date - Restrictive rules of standing "estate or interest": no third party rights - No requirement for mining lease to be advertised → public perception of clandestine activities - Public interest v private rights - anomaly between requirements for licence and a lease with regard to landowner consent to entry - Compensation for damage - onus on landowner to retrieve - Procedural and process inflexibility in Warden's Court. Department favours a tribunal. - No provision in Act for conferencing, although is conducted as is considered effective.

Jurisdiction	EDR Mode	Approval Process	Issues and Inadequacies
Environment Protection (Environment Protection Act 1973 + amendments)	Environment Protection Appeal Board	<ul style="list-style-type: none"> - Application for licence to operate (3 levels of EIA) - Advertisement by applicant - Objections against application to Director - Director's decision - Appeal against Director's decision to EPAB 	<ul style="list-style-type: none"> - Legislation out of date - Definition of "environment" inadequate e.g. does not account for social impact - Application process inadequate, process in response to general concern about need for realistic guidelines - Preliminary hearings under-utilized - Chairman EPAB hears appeal after presided over preliminary hearing of same case, question of denial of natural justice - Adversarial hearing process - intimidating and potentially costly - Hearings retain emphasis on procedure at expense of substantive issues in dispute
Land-use Planning (Local Government Act 1962 + amendments)	Planning Appeal Board	(A) <u>Permitted Use</u> <ul style="list-style-type: none"> - Application for development - Council decision - Applicant can appeal to P.A.B. (B) <u>Discretionary Use</u> <ul style="list-style-type: none"> - Application for development - Advertisement - Objections lodged with Council - Council decision - Appeals for P.A.B. 	<ul style="list-style-type: none"> - Legislation out of date - Third party rights restricted to discretionary developments - Pre-hearing conferences are underutilized and compulsory - Land ownership inequities, Crown exemption from Planning Control; Act does not bind the Crown - Potential for "Fast-Track" Legislation remains despite Planning Approval Process and Controls
Forestry (Forestry Act 1920 + amendments) (Forest Practices Act 1985)	Forest Practices Tribunal	(A) <u>Private Timber Reserves</u> <ul style="list-style-type: none"> - Application to Commission - Advertisement by Commission - Objections lodged with Commission - Commission decision - Appeal to F.P.T. against Commissions decision (B) <u>Timber Harvesting Plans</u> <ul style="list-style-type: none"> - Application for T.H.P. to Commission for approval - Commission decision - Appeal to F.P.T. against Commissions Decision 	<ul style="list-style-type: none"> - Restrictive rights of standing - No third party rights of appeal - Public interest v private rights - favours private rights - Private hearings of FPT perceived to be inequitable and in "secret" - Act has power to bind the Crown and is superior to Local Government Act -> implications for land-use planning

For the bureaucrat it is fragmented, prone to overlap and/or duplication of procedures and not conducive to either good public relations or a positive public sector and government image.

It all adds up to a rather inefficient system of decision making which, through its own inadequacies and an inability to keep pace with technological and social changes, often contributes to the development and escalation of environmental disputes rather than facilitating their resolution.

4.5 Conclusion

All environmental decision making occurs in a judicial and administrative context which has its origins in law. In Tasmania environmental disputes are addressed within the context of resource-specific legislation, a judicial and/or an administrative infrastructure, and an approval process.

The constitution of appeals systems external to the administrative infrastructure supports the opinion that systems of review must be seen to be removed from political influence either directly, or indirectly through the bureaucracy. In spite of the need to retain formal mechanisms of dispute resolution, there are presently deficiencies in their operations and procedures which adversely affect their effectiveness in the resolution of disputes, and in particular their inability to resolve the substantive as distinct from the procedural issues in environmental disputes.

That is not to say that they are uniformly inadequate or that they do not serve a positive function. It is more likely that times and public expectations have changed whilst legislation and systems for resource management have not kept pace with these changes.

There is now a preference for administrative tribunals rather than courts as the forum for the resolution of environmental disputes. This view was widely expressed by members of the judiciary and government, developers, bureaucrats and the public, and appears to be further supported by a stated preference from the Mines Division for a tribunal to replace the Mining Warden's Court. The Sea Fisheries Division and Magistrate Hannon have also expressed support for a tribunal to determine marine

farm and sea fisheries disputes.

The replacement of courts with administrative tribunals will not in itself address problems of restrictive rules of standing, the inability to resolve substantive issues, an adversarial arena, costs of litigation and lengthy public hearings. It is likely that, with the upsurge in public concern about environmental resource management issues, an increasing number of objections and appeals will be lodged. This will place additional pressures on both existing and future dispute resolution systems, which in turn emphasises the need to find more cost effective, appropriate and flexible mechanisms for preventing and managing environmental disputes.

CHAPTER 5

ENVIRONMENTAL MEDIATION: ITS TASMANIAN POTENTIAL.

Examination of five of Tasmania's environmental dispute resolution systems has revealed that, while there are a number of processes common to all, there are also inadequacies in both processes and procedures. In particular, they are unable to address the substantive issues in a dispute; rules of standing are very restrictive and third party rights are the exception rather than the rule; they are procedurally inflexible (tribunals less so but they still remain adversarial in format); there are potentially high costs of litigation for all parties; and the objection/appeal and hearing processes are very time consuming for government, industry, objectors and appellants.

It has also been noted that an upsurge in objections and appeals is likely as the public expresses its concern about inadequacies in resource management legislation, policies and practices . This is a manifestation of the inability of environmental decision making systems to respond appropriately or adequately to rapid technological and social change and increased economic pressures for natural resource development.

Environmental issues are here to stay and environmental disputes are going to remain a feature of life for the foreseeable future, with environmental issues already at the top of political, economic and social agendas (Hay 1987) .

Experience in USA and Canada demonstrates that environmental mediation is a flexible, cost-effective process for the resolution of site-specific and public policy disputes, ranging from small scale, multiple land-use disputes to complex, multimillion dollar disputes . Examples of the latter are the negotiation of pollution standards and emission controls for a Kraft pulp mill (Bacow and Wheeler 1983), and the construction of the Foothills Dam (Susskind et al. 1983), both of which were resolved by mediation after litigation had failed.

What has been, and still is lacking in Tasmania, is the identification and/or development of a framework or mechanism to facilitate the mediation process and so achieve a stable and constructive outcome without the public loss of face that so often accompanies these disputes. There are several possibilities .

Mediation can be incorporated into existing environmental decision making systems and/or it can provide an alternative to the traditional adversarial judicial and administrative tribunal models as a "stand-alone" strategy in its own right.

In Tasmania, mediation can be readily incorporated:

- (i) As an integral part of *Environmental Impact Assessment (EIA)* in any jurisdiction, for example, as part of the scoping and EIS development processes .
- (ii) As an integral part of the *Approval Process* in any jurisdiction, for example, mediation opportunities can be incorporated at key points in the application, objection and appeal procedures .

5.1 Mediation and Environmental Impact Assessment

5.1.1 EIA defined

EIA is the process whereby an estimation is made of the projected environmental impact of a proposed development. It is usually initiated by the developer, the content and procedures being negotiated with the appropriate statutory authority. A decision by the responsible agency is made on the level of assessment required and the application and requisite details are then lodged by the applicant. A notice of intent is subsequently lodged for public comment.

Porter (1987) describes a five stage process, viz:

- (i) Preparation of a statement of the developer's intentions which usually accompanies the application;
- (ii) The assessing agency decides on the level of assessment required.

This may range from a simple set of recommendations to the preparation of a report (often called a Public Environmental Report) on which public comment is sought, to a detailed environmental impact statement (EIS);

- (iii) Assuming a full EIS is required, a comprehensive set of guidelines is prepared by the assessing agency on the aspects to be covered and the amount of detail for each . This is scoping;

The guidelines are usually developed at a series of meetings with the developer and may involve other regulatory agencies and public interest groups;

- (iv) The Developer prepares an EIS, usually assisted by consultants . It is then published and made available for public review;
- (v) An assessment is then made by the decision making authority based on the original EIS and comments received from other agencies and the public. Assessment reports are usually issued by the environment minister and made public.

Most Australian states (the exceptions are Queensland and Tasmania) have specific environmental impact assessment legislation. Where EIA is implemented, it has led to a better informed public in respect of major developments, and one that is more environmentally aware (Porter 1987: 81) . However there remain variations among states in the definition of "environment", the need for social impact assessment as part of the EIA, and provisions for public participation (Atkinson and Morrison 1988).

Clearly there are advantages in having uniform EIA processes and procedures across jurisdictions. The same applies for approval processes, of which EIA is often a part .

South Australia has recognised this and following an exhaustive public consultation process has developed model processes and procedures for EIA in that state, (South Australia, EIA Review Committee 1986). Two levels of assessment are identified and a Public Environmental Report (PER) is developed for intermediate level proposals, while an EIS is developed for projects of major social economic or environmental importance.

Key recommendations in this approach are:

- retention of Ministerial discretion to determine the level of assessment for any proposal covered by the Planning Act, 1982 (S.A.);
- the incorporation of criteria for a PER and an EIS in subordinate legislation; and
- the EIS process to include :
 - a public hearing;
 - assessment by a specially appointed Environmental Assessment and Review Committee;
 - a decision by Cabinet with no right of appeal.

Porter's five stage EIA process and the South Australian process are in contrast with the informal and rather *ad hoc* Tasmanian approach which is in need of further development if it is to become a credible process rather than an obstacle to developer and public alike.

5.1.2 EIA in Tasmania

As described in Chapter 3, EIA in Tasmania has undergone major changes since the introduction of the *Environment Protection Act 1973*. However there is no EIA legislation and EIA processes vary haphazardly across jurisdictions. Although statutory organizations other than the Department of Environment and Planning may require some form of works programme to be submitted with an application for a development project (this is the case with a mining lease, for example), there is no formal requirement for an EIA as either described by Porter or the South Australian model, despite the inevitability of environmental impact.

There is also no uniformity of approval processes across the five systems studied. This compounds public and industry confusion and frustration and fosters allegations of inequitable treatment and secrecy which almost inevitably lead to conflict .

The Department of Environment and Planning currently has three levels of assessment, two being formal and published in Departmental policies and guidelines. However Level III assessment requirements are not stated in formal policies and guidelines and their development has been reactive rather than proactive in that they have been worked up on a case-by-case basis to deal with such developments as the Wesley Vale Kraft Pulp Mill and the recently proposed LWC paper project at Australian Newsprint Mills.

There is no consistency of process or procedure, although there has been an extension of opportunity for public comment in scoping in the LWC project. This opportunity was not available for the Wesley Vale proposal. To "learn as you go" is no longer acceptable. It is too costly for Tasmania in every respect and it is not surprising that criticism has come from many quarters. Tasmania needs to overhaul its environmental protection legislation, policies and practices, and to include EIA criteria and standard procedures in all resource management legislation.

5.1.3 Mediation and the EIA - Tasmanian style

Public consultation is acknowledged as the keystone of a successful EIA process and mediation has a valuable contribution to make as part of this process. It should not be seen as a substitute for public participation in the formal decision-making process, nor as a means of preventing parties from going to appeal if they so wish. It can nevertheless make an effective contribution to the EIA process in a number of ways.

(i) Scoping

Pre-EIS consultation involving the proponent/developer, relevant statutory/ regulatory agencies and public interest groups (including those in opposition) should be undertaken, and this usually involves a series of meetings. The presence of a neutral mediator at these would assist the parties to:

- (a) clarify the agenda and discuss their interests/concerns effectively;
- (b) develop the criteria to be included in the EIS guidelines;

- (c) identify specific areas of study/issues to be included and addressed in the EIS;
- (d) identify and delete matters which are agreed by the parties to be irrelevant or insignificant; and
- (e) assist parties in writing the guidelines. The final product could then be binding on all parties.

In this way, all parties are involved in the development of a set of guidelines which they consider cover all the issues and areas of study and which are achievable and workable.

Included in the guidelines should be a dispute resolution process agreed to by all the parties and which requires them to negotiate and/or mediate disputes before resorting to litigation. Such agreements are not uncommon in construction contracts in the building industry and in the insurance industry in other states (Australian Commercial Disputes Centre 1988).

The use of mediation in the pre-EIS phase also provides an opportunity for the inclusion of an adequate provision for social impact analysis and economic impact analysis in the EIS. These are presently excluded by the jurisdictional limitations of the Environmental Protection Act from the EIA process in Tasmania, despite the fact that the social and economic impacts of development are critical issues for the State and can determine the success or failure of many a project. There is no point in excluding contentious issues from the EIA agenda as they are frequently the substantive issues in the dispute, and they will only reappear in another form if not resolved. Mediation by a third party neutral at this point can ensure that the substantive issues are identified and addressed so that no hidden agendas remain to re-emerge in a destructive manner at a later date.

(ii) EIS

Traditionally the EIS is prepared by the proponent, or a consultant commissioned by the proponent, in consultation with the assessing agency. On completion the EIS is made available to the public for comment and objection. The normal period for public comment is 30 days, although this has been extended for complex projects. A public display period of 6

weeks is proposed for the LWC project.

- (a) Pending the development of new, comprehensive environmental protection legislation, it would be a constructive innovation if a social impact assessment (SIA) team could be formed to undertake the SIA component of the EIS . This would enable the developer, government and public to address these concerns, despite their present exclusion from existing formal systems. By participating in SIA, a developer and the government would demonstrate an appreciation of public concerns about social impact. A cooperative approach would also reduce the likelihood of subsequent objections and appeals on other grounds as a demonstration of dissatisfaction - even though the substantive issues may be of a social or economic nature.

The SIA could be undertaken by a small team of experts nominated and agreed to by the parties. It could perhaps be financed by the developer and government as a demonstration of good faith.

Mediation would be an asset in assisting the parties to agree to the composition of the SIA team if they were unable to reach agreement on this. It would also assist in identification of the issues, criteria and guidelines for the SIA study, as discussed in relation to the EIA generally .

- (b) A South Australian innovation which could be considered for adoption in the Tasmanian EIA process is the Environment Assessment Review Committee (EARC), the purpose of which is to provide an objective oversight of public views received and to give general direction to the entire EIS process . The Chairperson is constant, although the membership of each EARC changes with each EIS, depending on the nature of environmental experience required for the EIS in question (South Australia, EIA Review Committee 1986: 38).

The EARC is restricted to an oversight function. It does not perform a dispute resolution function and reservations have been expressed about its neutrality and independence from government - qualities essential for mediator credibility. Even were the concept of EARC introduced to Tasmania, it would not negate the need for a

mediation capacity in the EIA process.

5.2 Mediation and the Approval Process

As is evident from Figure 4, there are commonalities in the approval process, regardless of whether dispute resolution is ultimately by way of a court or an administrative tribunal. The common elements are:

- (i) Application for a licence/approval to develop a resource;
- (ii) Public advertisement of notice of application;
- (iii) Objections to an application are lodged with the relevant authority;
- (iv) Decision by statutory authority responsible for the resource;
- (v) Appeals are lodged against the decision taken by responsible authority;
- (vi) Hearing (public or private) by Court or Administrative Tribunal;
- (vii) Appeal against court or tribunal decision to Tasmanian Supreme Court on points of law only. This facility is available in most jurisdictions .

The areas of difference have been detailed in Chapter 2. In summary they are:

- variations in the rights of standing and the status of objectors and, therefore, applicants. Third party rights of objection are the exception rather than the rule.
- variations in the availability and use of pre-hearing conferencing. Where it exists it is compulsory and apparently under-utilized.
- variations in the power to bind the Crown.
- variations in the interpretation of priority jurisdiction and determination of the responsible authority/agency where a development proposal spans several jurisdictions. There is a lack

of clarity in the legislation and agreement on these issues appears to be by informal negotiation between the relevant agencies, culminating in a "gentlemen's agreement".

Additional areas of concern relate more to the hearing processes employed.

- the adversarial nature of both courts and tribunals.
- the inability of courts and tribunals to hear matters outside their specific jurisdictions, regardless of the significance of the matter to the development. This necessitates the submission of applications in multiple jurisdictions before a development can proceed.
- the general inability of courts and tribunals to address the substantive issues in a dispute, emphasis being on procedure rather than on substance.
- direct and indirect costs for all parties associated with the hearing process depending on the number of grounds of appeal and the number of appellants .
- problems associated with legal representation. These include the loss of control of the case by applicant and objectors; costs; and a tendency for legal intervention to lengthen and unnecessarily complicate the case by a traditional legal emphasis on procedure and technicalities at the expense of substance.

Mediation can make a valuable contribution at several stages of the approval process. By the inclusion of mediation, variations among jurisdictions and the areas of concern identified above can be addressed and resolved as follows:

5.2.1 Notice of application for licence or approval to develop

An applicant's intention to develop a project, whatever its nature, may or may not become known before the publication of the notice of application. After the notice is published there is an average 28-30 days for lodgement of objections to the application before a decision is made by the responsible Minister or statutory authority.

During this period of uncertainty, speculation is rife. All too often there is little constructive communication between the applicant and potential objectors, access to accurate and relevant information by concerned parties is often poor, and misinformation and innuendo abounds. There may also be no readily identifiable formal channels of communication to the relevant agency or to the applicant which might assist in correcting misinformation and allaying concerns of potential objectors about the impact of a proposed development.

Persons concerned about the impact of a proposed development often have to make the decision to object or not to object on the basis of inadequate information, available formally from the application, or informally. Information is often couched in scientific and bureaucratic terminology which, more often than not, aggravates rather than allays suspicions. There is much to be said for the use of "plain English" in environmental legislation, government publications, reports and impact statements.

An average of 28 to 30 days is often insufficient time for potential objectors to peruse and decipher scientific data, and translate it into "real" terms. It may also be necessary to get expert advice not readily available locally.

Given the above it is understandable that some objections may be lodged inappropriately on the basis of misinformation and misunderstanding.

It is in this period when potential objectors are considering the merits of their case and their decision to object or not to object, that mediation has significant value.

Mediation, at this point, would:

- (i) Ensure that all parties have the necessary information upon which to make an informed decision, and that the data is clearly understood. In addition it provides an opportunity for parties to seek clarification from technical and scientific experts agreed to by all parties. Objectors can then make a better informed decision in relation to the merits of the case, the validity of their objections and whether they wish to proceed with their objections.
- (ii) Assist all parties to identify issues and concerns and so gain an

improved understanding of each other's positions. Parties do not have to share the same values but they need to appreciate that a party's values are important to it, and are not necessarily "just tactics".

- (iii) Identify common ground among the parties and the preparedness and willingness of parties to "move" on common ground.
- (iv) Identify issues not in dispute.
- (v) Identify issues in dispute so that these can be addressed and, if not resolved by mediation, these issues may then proceed as objections.

5.2.2 Lodgement of objections

At the expiration of the objection period, all parties, that is, applicant, objectors and government agencies, should be offered the opportunity to consider a mediated settlement. As mediation is a voluntary process there should be no compulsion (this distinguishes mediation from compulsory conferencing or preliminary hearings as currently employed): it should remain the decision of the parties to use, or not to use mediation.

The mediator must be experienced, credible and agreed to by all parties. She/he would then contact all the parties to the dispute and, in conjunction with them, work out the most appropriate approach for resolving the issues in that particular dispute. Each dispute is different and each mediation process varies according to the nature of the dispute, the issues, the dynamics and desired outcomes of the parties (as discussed previously).

Possible outcomes of mediation in this phase are:

- (i) A complete information/development profile becomes available to all parties through the mediation process. Objections are identified and addressed and misinformation corrected.

The dispute is resolved and objections are withdrawn.

- (ii) A negotiated agreement is reached between the applicant and objectors, for example, a "staged" development, boundary modifications to a lease/permit site, or agreed forms of emission

control.

A formal agreement is signed by all parties and objections are withdrawn.

(iii) Some issues are resolved, some are not. Some objections are withdrawn but a minority of objectors decides to proceed to appeal.

(iv) Parties may decide to forego mediation and go directly to appeal.

5.2.3 Lodgement of appeals

By this stage, a dispute has usually reached an impasse, litigation costs are mounting and it is a highly emotionally-charged, adversarial "combat". This may act as an additional incentive for parties to negotiate.

Given comments about the procedural (as distinct from the substantive) emphasis of the judicial process and the very restrictive laws of standing in public interest litigation, the court's or tribunal's decision can only reflect the limitations of existing legislation and processes.

The advantages of mediation at this stage are:

- (i) Mediation offers parties at the point of impasse, a further opportunity to resolve the dispute, bearing in mind that public appeal hearings with legal representation and expert evidence, as is often the case, can be extremely costly, time consuming and inevitably intimidating, despite the relative informality of tribunal proceedings .
- (ii) Mediation "frees up" the resources and time of the court or tribunal, government agencies and the parties, by ensuring that only unresolved issues remain on the hearing agenda, should all the issues not be resolved by mediation.

The decision to proceed with mediation at this stage must be made by the parties. However there is no reason why a party, be it the applicant, government agency or public interest group, should not initiate the idea.

Alternatively, there is no reason why a magistrate or chairman of a tribunal could not ask the parties whether they would like to consider mediation as a final option before proceeding with the public hearing. In the Supreme Court of Hawaii disputants' participation is voluntary, but the Court may require parties to consider the use of mediation and postpone further court proceedings during a specified Mediation Exploration Period of 30-60 days. Mediation proceeds beyond this point only if participants so choose (Adler 1987a: 3).

- (iii) The position of the magistrate or chairman is not compromised by his participation in a preliminary hearing.

Mediation at this stage of the approval process could be very effective. Parties entering into mediation at this stage are invariably highly motivated and committed to achieving a satisfactory outcome.

However, parties may decline the opportunity and elect to continue to an appeal hearing. It is sufficient for one party to refuse to participate in mediation. In such a situation, unless a mediator can caucus with the resistant party and persuade it to try mediation, there may be no alternative but for all parties to proceed to a hearing with all its attendant costs and disadvantages.

At no point should mediation deny parties their right to proceed to litigation if they so choose.

5.3 Mediation as an alternative to litigation

The preceding sections have outlined the ways in which mediation can complement the EIA and Approvals Process. Not only is mediation of value and readily accommodated within existing structures, but it can be used as an alternative to existing methods of dispute resolution. That is, it can "stand alone" as a legitimate process in its own right or as part of an EDR package.

Victoria has already acknowledged mediation as a potentially valuable process for the resolution of such complex environmental disputes as the construction of a controversial, high-voltage transmission line through inner Melbourne (Powerline Review Panel 1989). The Victorian

government has also responded to a need expressed within rural Victoria for environmental mediation to be used to resolve land-use conflict (Sandford 1989b). In both cases, existing systems for dispute resolution have been deemed inadequate by the parties - industry, government and the community and it is considered that environmental mediation could provide a more constructive alternative. There is clear evidence of a preference by all parties for processes other than litigation.

Victoria's social and governmental structures and processes differ from those of Tasmania in that they tend to be more consultative and participatory. It also has a more consistent and established approach to social justice, conservation, energy and economics, as embodied in clear, published government strategies and policies.

State differences notwithstanding, there is every reason to be confident that environmental mediation could work in Tasmania. It is not proposed as a panacea or "quick-fix" solution for all disputes as there will always be parties who want to use litigation. It will also require a willingness and a commitment from government, industry and public interest groups to seriously consider and be prepared to try a non-adversarial process not used previously in any formal sense for dispute resolution in the state.

A significant proportion of Tasmania's resources is controlled directly or indirectly by government. Some 60 percent of the State's land is Crown land, approvals processes control the management of fisheries, forestry, mining, land and water resources, and environmental protection acts as a watchdog over most of those. Once land conservation legislation is developed (as is proposed), government will also have a degree of control over private and agricultural land, in addition to the controls it exercises through land-use planning and the Local Government Act. It therefore seems inescapable that in almost any environmental dispute, government is destined to be a party.

5.3.1 Site-specific disputes

Disputes may develop around site specific issues such as the development of a pulp mill or marine farm; the impact of tourism on recreational and wilderness areas; the relocation of a health facility; the establishment of a hazardous waste disposal site; the development of management plans for environmentally sensitive areas such as the Central Highlands or

coastal reserves; and the implementation of an agricultural chemicals and aerial spraying regime. In all of these, the government will be a party.

At present, there is no way of preventing what commences as a resolvable site-specific conflict from escalating into a full-scale dispute. Most of the above examples encompass a range of issues or sets of concerns that cannot be comfortably or adequately accommodated in any one jurisdiction or approvals process.

They are also disputes that are not appropriate to a judicial or litigated resolution. As was mentioned previously and as is substantiated by USA experience, lawyers, the judiciary, and even the administrative tribunal system are ill equipped to deal with the breadth and complexity of environmental issues generally (Sandford 1989a).

Mediation could be productively used to prevent the escalation and to facilitate the early resolution of many site-specific disputes. The case of the marine farm permit boundary (discussed in Chapter 3) is a prime example. In the absence of an alternative, parties have no option but to use traditional (inappropriate) processes.

Government could act as a change agent if it were to set a precedent for a cooperative rather than conflictual approach to environmental dispute resolution. Mediation only needs to be initiated by one party. It can then be considered and accepted by the others. It is the first step that is the most difficult.

5.3.2 Public policy disputes

Mediation can be an effective alternative for the resolution of public policy as well as site specific disputes. Public policy disputes often evolve from public concern about an issue, which is then taken up by government, eventually becoming policy or legislation. Land-use planning and environmental protection are but two areas where government plays a lead role in the development of public policy.

Conflict is likely to occur when it comes to determining priority legislation (and thus agency status and authority), power to bind the Crown, and powers of veto.

The public often assumes that public policy is policy designed and implemented in the public interest. In reality, there is no public policy process *per. se.*, nor any single policy process. There are many variations. It comes down to competition and negotiation among Ministers and government agencies for power and resources - at the expense of the public interest, some might say .

Public policy disputes are not uncommon. They are just less obvious than site-specific disputes, partly because public servants are bound by an oath of non-disclosure as a condition of service; partly because they are rarely newsworthy items; and partly because they are often unintelligible to the public, being couched in legalistic and bureaucratic argument and terminology.

The victim of public policy disputes is the public - industry and community alike. A public policy dispute over which legislation is superior in an approval process is expensive for industry and the community in legal costs and time taken as they are often threshold matters which must be resolved before the hearing can proceed.

Mediation could be invaluable in assisting government agencies to resolve public policy disputes. As with any parties to a dispute, confidentiality is important and no individual or agency wants to suffer the public loss of face that occurs when these disputes are played out in Cabinet or, occasionally, in the media. Bad news travels fast and poor handling of such a dispute may inhibit a career public servant's promotional aspirations .

Furthermore, although there may be some formal dispute resolution systems in place for site specific disputes (albeit deficient), there are no mechanisms to assist government agencies to resolve public policy disputes. It should also not be forgotten that federal, state and local governments are all involved in developing public policy and in the case of environmental policies all three levels of government may be involved (regulation-negotiations are one example). Consequently there needs to be a versatile dispute resolution process which can accommodate these differences in policy making, operation and procedure.

There should also be opportunity for public, including industry, input

into public policy. This occurs at present in an informal manner and via advisory committees, task forces and the like. However access to those forums is often inequitable and dependent on informal rather than formal networks.

Were mediation is available, it could serve two functions:

- (a) assist in facilitating the resolution of inter and intra Governmental public policy disputes; and
- (b) provide a mechanism to formalize and thereby legitimize public input to the environmental policy development process, including legislative and policy reviews.

5.4 The Implementation of Environmental Mediation in Tasmania

It has been established that existing dispute resolution systems are inadequate for addressing and resolving the complex and diverse environmental issues with which the State will be confronted in the 1990s and beyond. Environmental mediation has been proposed as an effective and cost effective process for the resolution of many site-specific and public policy disputes. Its versatility means that it can be incorporated into existing EIA and approvals processes or it can stand alone as a process in its own right. What is therefore required is an integrated EDR strategy of which mediation is a key component.

For mediation to succeed in Tasmania, there are three prerequisites:

- (i) Increased awareness and education of all parties about the process and benefits of mediation as a non-adversarial process for the resolution of environmental disputes;
- (ii) The development of a mechanism(s) or facility whereby parties wishing to consider mediation as an alternative to litigation can seek advice and obtain the services of trained and experienced mediators whose expertise and ethics are assured.
- (iii) The training of mediators as third party neutral professionals. It is not an arena for amateurs. Mediators should have a wide-range of

experience, expertise and qualifications. Mediation expertise should not be perceived as being restricted to the legal profession, as lawyers are, by virtue of their training, adversarially inclined.

- (iv) Overseas and interstate experience indicates that the most effective way of increasing public and governmental awareness and use of mediation is through the creation of a mediation service. In most cases mediation services have been trialled and evaluated over a three year period, as with the Offices of Public Disputes in the USA and the community justice centres in New South Wales, Victoria and, most recently, Queensland .

5.4.1 A Tasmanian Mediation Service - Office of Public Disputes

There are a number of factors that should be considered in the establishment of a mediation service, in particular its mission, functions and institutional location.

The mediation service must have a state-wide mandate and it would provide a focus for environmental dispute resolution which has hitherto been lacking.

Mission

The mission of a Tasmanian mediation service would be to promote the understanding and effective use of EDR among government agencies, industry, public interest groups, local communities and private citizens, with an emphasis on public/environmental disputes.

Functions

The functions of a mediation service should include:

- (i) Clearing House

As a clearing house, the mediation service would:

- (a) Collect and analyse information on the range of public/environmental disputes present and projected in Tasmania.

This should be conducted in consultation with government agencies, industry, industry organizations, conservation and other community groups, and members of the judiciary as appropriate.

It would essentially be an inventory of actual and potential disputes and could be coordinated by a public disputes coordinator with mediation expertise.

- (b) Identify and screen disputes suitable for mediation resolution;
- (c) Develop a register of public disputes mediators with a broad range of occupational skills and experiences, rural and urban . This would enable mediators and disputes to be "matched". Parties to a dispute could be given a "short list" of possible mediators from which they could select a mutually acceptable mediator, with the assistance of the public disputes coordinator.

Sources of mediators could be public agencies, community interest groups, industry organisations or interested individuals. This would assist in developing a pool of skilled and trained mediators with public interest expertise who, although unable to mediate disputes in which their own agency or organisation was involved, would be available to mediate disputes elsewhere.

(ii) Dispute Resolution

The mediation service would directly mediate disputes, be they site specific or public policy. It would also provide a mediation service to the EIA and Approvals Processes as discussed in the previous section. In addition to providing a direct mediation service, it could also act as a catalyst to mediation by others.

The credibility and effectiveness of the service will initially be established by the selection and successful mediation of several complex and significant test cases.

(iii) Consultancy and Advisory Service

An advisory service would be provided to government agencies, or any other parties and interested persons or organizations, on the resolution

of public disputes which arise during the course of their activities.

A consultancy service on the design and implementation of public affairs and dispute resolution strategies and systems would also be provided as preventative of the development of disputes.

(iv) Training

The service would sponsor training courses in EDR to familiarize the judiciary, senior resource managers in government and in industry, and the public with EDR techniques. It would serve three purposes:

- (a) Stimulate the demand for EDR through seminars for senior administrators;
- (b) Train mediators and so develop a core of trained mediators with expertise in public disputes;
- (c) Promote EDR generally through the establishment of an EDR network both locally and nationally.

(v) Research

Undertake an evaluation of EDR generally and the mediation service in particular, and other research as appropriate .

Institutional location

The USA experience suggests that there is no single answer to the question of institutional location of a public disputes mediation service. Irrespective of its location, it must be independent (and be seen to be independent) of external influence, be it from government, industry or the community. To be successful it must have political neutrality, independence of operation and credibility. It must provide a totally confidential service.

Potential institutional locations for a mediation service as described are:

- (i) within the Tasmanian public sector;
- (ii) in a non-profit organization;

- (iii) in a tertiary institution;
 - (iv) in the private sector;
 - (v) in a tripartite/multiparty structure.
- (i) In the Tasmanian Public Sector

Historically, environmental dispute resolution in the USA has been based in non-profit organisations and universities, although government agencies have been parties at the table in 83 percent of all mediated site-specific disputes (Bingham 1986). Given this, not only has EDR expertise been accumulating in non-profit and academic organisations, but the lack of formal connections with and access to government agencies and other institutions in site specific disputes and public policy decision making has been proving a major obstacle to effective mediation (Haygood 1988).

As a result, since 1984, mediation offices have been established within State government agencies. They have been designed to promote the use of mediation to resolve disputes of statewide interest. The range of activities undertaken varies and reflects the institutional location of each. The models vary widely from location in the state judiciary, to a state planning office, and the office of a public advocate.

An evaluation of four state offices of public dispute resolution in the USA (Szanton 1988) revealed that, although there were striking differences in location and in the sources of their day-to-day political support, the significance of these different placements was small. Haygood (1988) also suggests that institutional relationships may be as important as formal location, as the institutional location of an office and its primary transinstitutional links both clearly affect the opportunities and challenges the office faces.

The extent of government involvement in and control over environmental decision making in Tasmania makes it imperative that, if a mediation service is to succeed, it must have formal connections with and access to government decision making processes. For this reason alone, a case can be put for a mediation service or an Office of Public

Disputes to be located within the Tasmanian public sector.

While due consideration would, no doubt, be given to the relative merits of each institutional location, it could also be predicted that there would be competition among Ministers and agencies, so that the final decision on the precise location of a mediation service would inevitably be a political one.

Within the Tasmanian public sector there are several possibilities:

- (a) within a central agency; for example, Department of Premier and Cabinet;
- (b) within an executive branch agency; for example, Department of Environment and Planning, which has direct responsibility for policy decisions on such substantive issues as land-use and environmental protection .
- (c) within a line agency; for example, the Departments of Forestry, Primary Industry, and Resources and Energy;
- (d) within an independent statutory body; for example, the proposed Tasmanian Resources Assessment Commission;
- (e) within a public advocacy authority; for example, the Ombudsman.

The advantages and disadvantages of each institutional location as outlined below are adapted from Haygood (1988).

A. Central Agency

The Department of Premier and Cabinet is the central agency in the Tasmanian State Service. The advantages of locating a mediation service within this agency would include:

- (a) ease of access to government decision makers;
- (b) a central location may assist in interagency disputes, Department of Premier and Cabinet having a policy coordination role;

- (c) the ability to assist with regulation development, and implementation of government policy;
- (d) the identification and promotion of opportunities for public policy dialogue;
- (e) high level support may facilitate entry into significant public policy disputes .

Potential disadvantages of a location within this Department are:

- (a) difficulties of access and entry to cases. The Department of Premier and Cabinet is removed from substantive contact with industry and the community;
- (b) public perceptions of bias in favour of the state or government of the day are likely;
- (c) it would be vulnerable to bureaucratic politicisation;
- (d) it would be vulnerable to extinction with a change of government.

B. Executive Branch Agency

The Department of Environment and Planning is an agency which has a direct responsibility for land-use planning and management and environmental protection in the broadest sense. It could be the lynchpin in the development of a Statewide integrated resource management and environmental dispute resolution strategy. It is also likely to be responsible for wide ranging legislative, administrative and policy review, EIA, and the Approvals Processes for land-use planning and environmental protection.

The advantages of locating a mediation service in this Department include:

- (a) the presence of an "inside" proponent of dispute resolution lends greater credibility to dispute resolution processes;
- (b) relatively easy access to government decision makers;

- (c) provides a useful opportunity to assist in the resolution of interagency conflicts;
- (d) can assist with enforcement negotiations, administrative hearing processes, regulation development and promulgation .

In the 1990s the Department of Environment and Planning will be an active participant in proposing, promoting and implementing legislation which is likely to give rise to controversy and opportunities for dialogue.

- (e) high level support may also facilitate entry into significant public policy disputes.

Possible disadvantages include:

- (a) may be "suspect" in the opinions of some as a representative of the State;
- (b) potential for conflicts of interest when the dispute involves the Department;

The location of a mediation service in an agency such as this has not proved a problem in the USA where steps have been taken to insulate the service from political pressures by drawing clear boundaries and distinctions between the mediation service programs and those of their host agencies (Haygood 1988: 8).

Haygood notes further (1988: 8) that several of the mediation offices or services use advisory boards composed of members from within and outside state government for advice and consultation.

C. Line Agency

In 1988 there were no examples of the location of a mediation service within a substantive or line agency in the USA as it was considered that the disadvantages outweighed the advantages (Haygood 1986: 9).

Disadvantages include:

- (a) proximity to disputes negates neutrality;
- (b) limited mandate in terms of functions and authority; for example, limited to forestry, fisheries or mining;
- (c) conflicts of interest, such as a statutory requirement to implement and enforce legislation and policies .

D. Independent Statutory Body

The establishment of a Tasmanian Resources Assessment Commission (TRAC), possibly modelled on the Federal Resource Assessment Commission, is planned by the State government (Crean 1989). Little is known (or can be found) about the proposed functions and objectives except that it is to assess proposals for resource development in Tasmania and that legislation is proposed for early 1990.

Whether or not it may be an appropriate location for an environmental mediation service will be dependent on its constitution, purpose and mandate, which are yet to be determined. If it resembles the federal model, it may in fact be an appropriate location for a mediation service which, amongst other functions, could provide a mediation service to the TRAC itself, and to the EIA and the Approvals Processes, as well as undertaking the functions mentioned previously.

The Federal RAC is an independent body which enquires into and reports to the Prime Minister on the environmental, cultural, social, industrial, economic, and other aspects of Australia's resources and their uses (RAC 1989) . It was established under the *Resource Assessment Commission Act 1989* and its role is to "assemble information on specific resource issues and to provide a process by which all interested parties can have their views impartially and independently considered" (RAC 1989: 1) .

It is essentially an investigatory body which either reports on possible courses of action or provides an overview of an issue, depending on its terms of reference for a particular inquiry. A Tasmanian equivalent could perhaps provide an appropriately independent and neutral base for the location of an environmental mediation service.

E. Public Advocacy Authority

Tasmania has no such agency with the exception of the Ombudsman's office. This would not be an appropriate location. The office of the Ombudsman has been widely criticized of late as it has been seen to have been politicalized, and this has seriously damaged the credibility of the office.

New Zealand and Victoria each has a public advocate for the environment, although their roles and functions vary.

New Zealand's Office of the Parliamentary Commissioner for the Environment is an independent review agency on environmental issues. It is outside of government and the Commissioner is appointed by the Governor-General on the recommendation of the House of Representatives. Although New Zealand is presently engaged in a major reform and rationalisation of its resource management laws, the office of the Commissioner for the Environment will continue (NZ Ministry for the Environment 1989).

The Victorian Commissioner for the Environment is also an independent office established by statute. Its present role is limited to the preparation of annual environmental reports on matters such as water quality, it does not function as an environmental ombudsman, and its resources are very limited (Scott 1989) .

Were its objectives and functions reviewed, it could perhaps provide a possible base for a public dispute mediation service. The author understands that this situation is being actively considered at the present time .

On the other hand, if it were to have an environmental advocacy function, the office may be perceived to have a conflict of interest and so be in breach of that essential quality, mediator neutrality.

(ii) Non-profit organisations

In the USA mediation services have been provided by numerous non-profit organisations. Some have been formed specifically to provide such a service, for example, the New England Environmental Mediation Centre.

This centre assists in a wide variety of land-use, facility-siting and pollution control disputes, it facilitates dialogue over public policy, and it provides training. It is funded by grants from a philanthropic foundation and fees for service levied on a case-by-case basis.

It is conceivable that a comparable organisation could be established in Tasmania, perhaps supported by assistance from a trust such as the Sidney Myer Trust. It would have the advantages of independence from government, and neutrality of operations. Disadvantages could be funding uncertainty, difficulties in the determination of fee-for-service criteria, and a lack of access to government decision making.

(iii) Tertiary Institutions

Tertiary institutions have played a pivotal role in the development and promotion of EDR in the USA. Not only do they conduct applied research and training courses, but their staff play a very active role as mediators in a wide range of disputes, including labour management and international environmental disputes.

The Harvard Law School and the Massachusetts Institute of Technology conduct programs in mediation and public dispute resolution.

In Sydney, the Sydney University Law School has introduced final year studies in alternative dispute resolution, and law schools in other states are doing likewise. There is, however, no *prima facie* reason why EDR should be sited in law schools. EDR requires mediators with an ability to consider a wide range of complex economic, social, political and environmental issues which are often interrelated and interdependent. Any tertiary institution contemplating the adoption of a mediation component must take into account the value of a multidisciplinary approach and avoid EDR being "captured" by any professional discipline.

Possible advantages are perception of mediator neutrality, and access to research and educational expertise. Possible disadvantages are lack of formal communication with and access to government decision making, and lack of communication with industry and the public generally.

(iii) Private Sector

Mediation services can also be provided by the private sector. There are numerous private sector consultants and companies in Canada and the USA which provide a mediation service on a fee-for-service basis like any other commercial operation.

Such an operation is relatively straightforward in the case of costing and charging for mediation of labour-management, commercial or family disputes where there are a limited number of clearly identified parties. Environmental disputes are more complex to cost.

It is understood that the Australian Commercial Disputes Centre (ACDC), a Sydney based private commercial disputes company, has considered expanding into environmental mediation but is concerned about the difficulties of determining a fee structure.

The advantages of private sector involvement are:

- (a) it creates a ready source of supply of mediators;
- (b) perceptions of a conflict of interest are less likely to occur, particularly in disputes where government or industry are participants;
- (c) mediator neutrality.

Disadvantages include:

- (a) lack of formal communication with and access to government decision making;
- (b) may be perceived to be profit rather than public interest oriented.
- (v) Tripartite/Multiparty Structure

The author is not aware of precedents for this model although they may well exist. Nevertheless, given the widely expressed concern about the inadequacies of existing dispute resolution mechanisms by government, the private sector and public interest groups, there would appear to be merit in the establishment of a tripartite or multiparty environmental

mediation service.

In the field of land degradation, the Landcare Program is a good example of how organizations with apparently divergent, if not conflicting interests can come together for a common purpose. In this case, the National Farmers Federation and the Australian Conservation Foundation and their state counterparts, have combined forces to tackle the problem of land degradation at both a state and a national level.

It is conceivable that a tripartite or multiparty approach to the resolution of public disputes may also be effective. In this case, industry, government, public interest groups, and a tertiary institution such as the University of Tasmania could be involved.

Assistance to support a mediation service could take a number of forms according to the nature and extent of the resources of each party:

- direct financial assistance to pay mediator salaries;
- provision of suitable accommodation/facilities, printing, computing and other resources;
- access to expertise, information and research support.

A tripartite/multiparty mediation service could be managed by a representative committee/board, chaired by a neutral outsider .

The advantages of this model would be:

- (a) it would optimize the involvement by and commitment of the key parties in most public disputes;
- (b) it would assist the promotion of EDR concepts and public awareness;
- (c) it would provide a "working-model" of the ways in which industry, government, public interest groups and academics can work together in the public interest;
- (d) it is consistent with the collaborative approach being promoted by the State government in the areas of resource development and

economic policy.

Disadvantages could include:

- (a) "power struggles" for control of the service by a particular interest group. This could be minimized by the appointment of an independent Chairperson;
- (b) difficulties in determining the funding/financial support equivalents by the parties.

The multiparty organization is an exciting and innovative concept which would reinforce the value of environmental mediation as a collaborative process for the resolution of public disputes in Tasmania.

There is no single "best" location for EDR in Tasmania but two options warrant further consideration:

- (a) location within the Tasmanian public sector; and
- (b) location with a multiparty body representative of government, industry, public interest groups and academia.

The development of EDR in non-profit organizations and the private sector may occur of its own accord. What is needed at this time is for the Tasmanian government to lead the way in the promotion of environmental mediation as a flexible and innovative alternative to the traditional adversarial model.

Tasmania can lead Australia in environmental dispute resolution if it so chooses. Environmental mediation is not a gamble, it is a proven, cost-effective and constructive process which can assist in optimizing resource management while minimizing social, economic and environmental dislocation .

5.5 Conclusion

The adoption of environmental mediation as part of an integrated environmental dispute resolution strategy, must be further studied.

Environmental issues are here to stay and environmental mediation is a growth industry in the USA and Canada. It is therefore of concern that environmental mediation may be seen as a new "quick-fix" solution when other processes have failed. If this were the case, it would run the risk of being discredited.

Furthermore, attitudes are not going to change quickly. Tasmania is attitudinally conservative and may well be cautious, if not suspicious of what could be perceived as a radical new idea. The fact that mediation has been successfully used in other states and overseas does not guarantee it an enthusiastic reception in Tasmania.

Perhaps the 1989 Pilots' Dispute has brought home to Tasmanians the economic and human costs of prolonged adversarial disputation. Perhaps there is an increasing appreciation of the desirability of avoiding the development of a litigious mentality as has happened in the United States. It is hoped that these experiences and knowledge, together with the pattern of cooperation, collaboration and negotiation that is being promoted by the current State government, will foster a receptive climate for the introduction of environmental mediation.

From the author's analysis of the literature, and relevant legislation, case study material and discussions with government agencies, disputants, and members of the judiciary, it is concluded that in order to develop the most appropriate system for EDR in Tasmania, it will be necessary to consider a combination of mediation and litigation. Opportunities for parties to use litigation should remain while mediation is used as an alternative to litigation in selected site-specific and public policy disputes and as a complement to litigation in the EIA and Approvals Processes.

CHAPTER 6

FUTURE DIRECTIONS FOR EDR IN TASMANIA

6.1 Introduction

The author's search for more contemporary and constructive options for the resolution of Tasmanian environmental disputes was prompted initially by her concern about the social, environmental, and economic repercussions of bitter resource management conflicts on local communities. This then led to a search for less adversarial alternatives to the traditional confrontations, in both Australian and overseas literature.

It rapidly became apparent that there was a dearth of Australian literature on EDR, Australian literature and experience being restricted primarily to the practice of ADR to resolve community, and more recently commercial, disputes. It also became clear that the USA was in the forefront of mediation of environmental disputes. However USA literature concentrated heavily on the use of mediation as an alternative to traditional judicial and administrative processes and to a lesser extent on the possibilities and benefits of redesigning existing legislation, policies, and decision-making systems processes to incorporate mediation opportunities as an integral part of environmental decision-making.

There is a considerable body of literature on the characteristics of public disputes, and on mediation as a process, its techniques and the roles and functions of mediators (Folberg and Taylor 1984; Susskind and Cruikshank 1987; Adler 1987; Moore 1987 and 1989; Carpenter and Kennedy 1988). The current level of sophistication on environmental mediation theory, appears to have grown out of the use of mediation to resolve site specific disputes (Lake 1980; Bingham 1986; Susskind *et al.* 1983; Susskind and Cruikshank 1987; and Amy 1987); public policy disputes (Bingham 1986, Ehrmann and Lesnick 1980; Amy 1987; Laue 1988) and regulation

negotiation (Bingham 1986; Haygood 1988).

There is evidence that all these types of disputes have been, or are being experienced in Tasmania and it appears that mediation could well make a positive contribution to environmental dispute resolution in the state, cultural and political differences between the USA and Tasmania notwithstanding.

This conclusion is further borne out by the Canadian experience of environmental mediation, including the link between mediation and the Westminster system of government (Sadler 1986), the incorporation of negotiation and mediation into existing EIA, approval and appeals processes (Jeffrey 1987), and the development of a system for the resolution of wilderness disputes (Rankin 1989).

In the light of both the USA and Canadian experiences, it is considered that there is definite potential for the successful application of mediation to the resolution of environmental disputes in Tasmania. The nature of the disputes - site specific, data, public policy, and regulation negotiation - is comparable and the existing judicial and administrative systems have been widely criticized by all parties, members of the judiciary and government as being inflexible, fragmented, procedurally oriented and, in many cases, unable to address (let alone resolve), the substantive issues in dispute.

The attitudinal conservatism of Tasmania, including in the political sphere, the direct and indirect costs of dismantling existing processes, and the Canadian experience with the Westminster system, suggest that rather than emphasising mediation as an alternative for existing processes, there will be more value in looking at the possibility of rationalizing and redesigning existing systems. This would achieve a more integrated approach to both EDR and environmental decision-making across all jurisdictions with a greater likelihood of success, in that it would retain the best elements of the "known" while incorporating opportunities for negotiation and mediation at strategic points. This would then expand the EDR options available to all parties while minimizing the possibility of rejection of the "unknown".

To discard present arrangements in their entirety would be to invite a

conservative backlash from government agencies and some of the parties in the absence of locally proven alternative approaches. Environmental mediation is a little known concept in Australia, let alone in Tasmania and education of government, industry, public interest groups, and the media in the theory, practice and possibilities of mediation is required as a precursor to adoption. To expect Tasmania to embrace environmental mediation from a "cold start" would be unrealistic in the wake of its experiences with large scale environmental confrontations and its general resistance to new ideas from elsewhere.

6.2 Proposals for change

As indicated, Tasmania lacks both a strategic approach to environmental decision-making on a statewide basis and an integrated environmental dispute resolution system. The relatively small population of the island, the centrality of effective resource management to the State's economic and social future and the heavy toll taken by environmental disputes, make it imperative that a concerted and non-partisan effort is made to develop a comprehensive and coordinated strategy for environmental decision making and dispute resolution.

Mant (1989) also proposes a more coordinated approach. He recommends the amalgamation of all the legislature dealing with Crown Lands into a single Lands Act and the development of a single Approvals Act to incorporate all land-use, pollution licensing and other approval mechanisms. In addition, Mant proposes a general right of standing for members of the public to enable them to restrain breaches of appraisals and legislation.

To implement and administer this legislation, Mant suggests a single multidisciplinary land management agency such as the Department of Environment and Planning so that all land management and land-use activities of the State Government can be brought together under one Minister. To keep the Ministry honest, he suggests a public enquiry process for developing controls over private land and for categorising public lands. As Mant sees it:

If changes along the lines of the above were made now, Tasmania could lead the world in the creation of a truly modern administrative and legislative framework for the ecological management of land

(1989: 8).

Both the Local Government Act and the Environment Protection Act are seriously deficient for the 1990s. The Department of Environment and Planning, which has responsibility for the administration of both these Acts, supports a legislative review of land-use planning and management as do members of the Government, the Green Independents and the Liberal Party.

The Department of Resources and Energy (Mines Division) favours deregulation and a single development licence to include mining, environmental and planning approvals. It perceives the advantages of this approach as being the simplification of the process for the applicant, the land owner and third parties. It further recommends that the procedures be formalised and incorporated in legislation.

The Tasmanian Farmers and Graziers Association has now developed a policy on land-use planning, primary producers being the largest private owners of land in Tasmania. The policy argues the need for the protection of the State's rural resource base and its development on a sustainable basis; the need for responsible land-use planning procedures for the subdivision of rural land; and the need for Right-to-Farm legislation (TFGA 1989). The TFGA policy statement addresses issues of rural subdivision, World Heritage listings, the National Estate, the Central Plateau, Mining, land capability, and integrated catchment management. It is a considered and timely document, the production of which appears to be in part a response to the change of State government. The TFGA membership has traditionally supported conservative political parties such as the Liberal Party and the election of an ALP-Green Accord has created some uncertainty about the future security of private agricultural land.

The TFGA Land-Use Policy Statement does however make several recommendations for the rationalization of land-use planning appraisal and appeals systems which are similar to those proposed by the Mines Division, Mant and the Department of Environment and Planning. It proposes the use of land capability assessment as fundamental to any approval by local councils, and the creation of what the TFGA has termed a "Land Court" comprising representatives from each of Department of

Environment and Planning, TFGA, Chamber of Mines, and the (former) Town and Country Planning Commission, with an independent Chairman (TFGA 1989).

The author sought clarification from the TFGA on its use of the term "Land Court" as its format appeared to be more tribunal than court. This was confirmed by the Executive Director TFGA; that is, the intent is an administrative tribunal.

6.3 Tasmanian resource profiles

Another component of a legislative and administrative rationalization should be the development of a comprehensive, central database of the State's resources - a Tasmanian resource profile, in which economic, social, biophysical and environmental values are determined for each resource.

This cannot be achieved by the current fragmented approach where each resource is managed in accordance with its own legislation and by a bureaucracy of resource specialists. A significant amount of data is already available. For example, the Forestry Commission and the Department of Environment and Planning each has a Geographical Information System (G.I.S.) and data banks on land management issues specific to each jurisdiction. The Department of Primary Industry also intends to acquire a G.I.S. for use in land capability assessment of agricultural land.

Compilation of a state resource profile requires a multidisciplinary approach. Resources have traditionally been appraised according to their economic value. The evaluation of the social and environmental value of a resource is more difficult and would be best achieved through the use of multidisciplinary project teams rather than by resource specialists working in isolation from one another. Whether these teams are based in a centralized, multidisciplinary agency as proposed by Mant (1989), or are drawn from existing structures as required, needs further investigation.

The establishment of composite resource profiles would assist in legitimizing social and environmental factors within environmental decision making and approval processes. It would also provide baseline data which should be accessible to all parties in a dispute and would go

some way towards equalising the imbalance of power in environmental disputes when information and data is either not available or is not accessible to all parties.

The development of a resource profile as described is a challenge, but an achievable challenge. It would provide a baseline for future strategic planning in the state.

The scene is set. There is widespread agreement among industry, public interest groups and government that resource management legislation and environmental decision-making administrative systems are in need of urgent review. What is needed is initiative and creative thinking.

6.4 Environmental mediation - future prospects

Provisions for EDR and in particular mediation should be incorporated into all legislative and administrative decision-making processes. All EIAs and EISs should contain dispute resolution mechanisms as a pre-condition for approval. Parties should be able to anticipate that conflict is possible at some stage in the development process and so should agree to build in dispute resolution procedures to both the EIA and EIS process. They should also agree to consider mediation of their differences prior to seeking redress by way of litigation.

The previous chapter confirms the value of mediation at key points in both the EIA and Approvals processes. Any new and/or reviewed legislation and administrative systems should include provisions for mediation as recommended in Chapter 5.

There should also be provision for the use of mediation as an alternative to litigation at the discretion of the parties. For this to become a reality, a mediation service must be available and this is best achieved initially through a government supported and promoted Office of Public Disputes.

Environmental mediation could play a leading role in Tasmania's future, if only the State is prepared to consider and embrace some new ideas which would make it a pacesetter in environmental dispute resolution in Australia. Where better to test out the effectiveness of an "idea whose time has come" than in a crucible of environmental discontent?

6.5 Toward an EDR system for the future

An idea is one thing, its implementation is another. Tasmania needs an integrated environmental dispute resolution system which includes:

- (i) legislative and administrative review and rationalization;
- (ii) a uniform EIA process across all jurisdictions;
- (iii) a uniform Approvals Process across all jurisdictions;
- (iv) an Office of Public Disputes;
- (v) a Land and Environment Tribunal.

6.5.1 Legislative and Administrative Review and Rationalization

Support for a legislative and administrative review and rationalization of resource and land management is well established. The inefficiencies and costs of retaining the present multiplicity of resource-specific legislative and administrative packages far outweigh their value. It also prevents the development of a statewide strategy for resource management as the fundamental building block of the State's future.

Mant's (1989) proposal for a single Lands Act and a single Approvals Act encapsulates many of the recommendations made by agencies, industry, public interest groups and individuals to the author during the course of this thesis. A Lands Act could also include land conservation, land capability, and flora and fauna protection guarantees, in addition to land-use planning and land management prescriptions. It is envisaged that Codes of Practice for land conservation and land management would also be developed.

It would be a brave Minister who endeavoured to include forests and mining practices in a single Lands Act, although the Mines Division has supported a single approvals process. A Lands Act could not include sea fisheries or marine farm leases or permits. It would, however, control their land-based operations.

The implementation of a single Approvals Act and approvals system for all proposed developments would be well received by all parties. Chapter 5 has identified the commonalities among existing approval processes and there are very few differences of any magnitude. It is anticipated that support for the concept of an approvals mechanism would be forthcoming from groups as diverse as the TFGA, the Chamber of Mines, the Tasmanian Conservation Trust and the Tasmanian State Service (although its implementation may be more difficult).

The alternative to a total legislative and administrative rationalization is the retention of resource-specific legislation for fisheries, forestry and mining while rationalising land-use planning and environmental protection in either a Lands and Environment Protection Act, or a Lands Act and a separate Environment Protection and Impact Assessment Act. This would be less difficult as the Local Government Act and the Environment Protection Act are now administered by a single Minister and a single Department.

6.5.2 Standardization of EIA and Approvals Processes

Irrespective of the legislative rationalization adopted, EIA and Approvals Processes and procedures should, and could be, standardized across all jurisdictions. Comparisons made in Chapter 4 reveal more similarities than differences.

Standardization would ensure consistency of operation. Provision should be made for graded EIA assessments, for example Levels 1, 11 and 111, the latter category to accommodate large-scale and complex projects such as the Wesley Vale Pulp Mill and the Light Weight Coated Paper project at ANM, Boyer. Projects of this scale should be assessed within the usual regime rather than dealt with on a case-by-case basis. The EIA and Approvals Processes should have sufficient flexibility built into them to achieve this.

The creation of a Tasmanian Resources Assessment Commission as a discrete entity to handle EIA and approvals for selected projects should not be necessary if a comprehensive and co-ordinated EIA and single Approvals Process is in place, as this system would provide for deregulation

of the development process without the problems of perceived denial of natural justice and inequity that the establishment of a separate TRAC could create.

A Resources Assessment Commission should not be used as "window-dressing" for "fast-track" legislation as mentioned by Pitt (1988). The government always retains the power to legislate the passage of projects if it so chooses. If this be the case, it should be prepared to be accountable and to publicly defend its actions rather than to hide behind a bureaucratic facade.

The incorporation of EIA and the Approvals processes in legislation, as in the EIA Acts of other states, and the single Approvals Act proposed by Mant (1989), should be investigated. Providing the legislation allowed for resource differences, there would seem to be advantages in ensuring that the principles and procedures of EIA and Approvals could be enforced for all resource management. EIA and Approvals legislation could also apply to fisheries, forestry and mining as well as land-use and environmental protection.

6.5.3 Office of Public Disputes

The creation of an Office of Public Disputes will address the key deficiency in Tasmanian EDR, that is, the lack of an appropriate mechanism or framework for the prevention, management and resolution of environmental disputes. It will provide a dispute resolution focus for all parties, government, industry and the public.

The TRAC as proposed by Crean (1989) is an attempt to establish such a framework. However the TRAC mandate and functions as proposed are too restrictive and are focused on assessment rather than on dispute resolution. Furthermore it is likely that the TRAC will not have the capacity to address a wide range of disputations, but will consider only those referred to it, which are likely to comprise current Level 111 projects.

The mission, functions and two potential institutional locations of an Office of Public Disputes were outlined in the preceding chapter. Not only would such an office provide a direct dispute-resolution service to the EDR system as a whole, but it would be a valuable resource to assist

government and industry to design effective dispute resolution systems for the prevention of the development of disputes.

This office will be an essential part of the new EDR system.

6.5.4 Land and Environment Tribunal

Evidence suggests that, regardless of whether environmental dispute resolution systems are centralized or decentralized, administrative tribunals rather than courts are the most appropriate and the preferred forums for hearings.

The establishment of a centralized resource appeals tribunal, a Land and Environment Tribunal, would receive widespread support. It would address the issues of:

- (a) inconsistency and fragmentation of process and procedure across jurisdictions by replacing the many judicial and administrative processes with a single, centralized tribunal system;
- (b) as an administrative tribunal it would have the potential to overcome judicial limitations of rules of evidence, procedural inflexibility and the emphasis on private rather than public interest;
- (c) it would obviate the necessity for sequential approval and hearing processes in different jurisdictions;
- (d) as a multi-party tribunal it would overcome the inadequacies of a legally qualified person acting alone to resolve resource disputes in which he/she has little expertise or experience. (The degree to which this objective can be achieved will depend to a large extent on the composition of the tribunal.)

Given the diversity and complexity of environmental issues, including the need to incorporate social and economic as well as biophysical impacts, a single tribunal would not be feasible. A more effective and efficient approach would be:

- (a) the appointment of several Commissioners to chair tribunals. One could be full-time to ensure continuity and- security of supply and the remainder could be part-time. Although it would be advantageous to have legal expertise on tribunals, it is not always essential and there is no reason why persons chairing tribunals must be legally qualified. A range of expertise and experience among the Commissioners is essential;
- (b) a core of resource specialists and other persons with relevant industry and community experience should be established to support the Commissioners on tribunals;
- (c) tribunals would be convened as required to hear disputes pertaining to the resource in question. The Chairperson and tribunal members for a dispute would be selected on the basis of relevant expertise and experience;
- (d) tribunal members often have professional expertise and resource relevant experience, but in the author's experience, many have inadequate communication and dispute resolution skills, which should be essential pre-requisites for any person wishing to serve on a tribunal.

The Office of Public Disputes could sponsor the training of tribunal members in dispute resolution skills as required;

- (e) The Land and Environment Tribunal would also act as a point of referral to the Office of Public Disputes for parties at the point of impasse and for whom mediation may be an option. This would provide an effective liaison of the adversarial and non-adversarial systems so that they could work in a complementary and mutually beneficial manner.

The development of an integrated EDR system is essential, timely and, most importantly, it would be in response to a proven need as identified by industry, the public and government agencies. All parties have been critical of traditional adversarial systems for reasons of their propensity to polarize and exacerbate issues and emotions in a dispute; their inability to resolve substantive issues; the high costs of litigation; and the lengthy

approval and hearing processes.

It is time to change from a fragmented, adversarial system to an integrated and essentially non-adversarial EDR system as a prelude to a more collaborative approach to environmental decision-making and dispute resolution in the 1990s and beyond.

6.6 EDR systems options

In the author's opinion there are three structural options for a Tasmanian EDR system. There are advantages and disadvantages associated with each. Some of the components are constant and some are variable. The options are:

6.6.1 A centralized EDR system to include:

- (a) a Lands Act;
- (b) an Environmental Impact Assessment Act (or an Environment Protection and Impact Assessment Act);
- (c) a single Approvals Act;
- (d) an Office of Public Disputes;
- (e) a Land and Environment Tribunal.

6.6.2 A decentralized EDR system to include:

- (a) retention of existing resource-specific legislation;
- (b) uniform EIA processes (with or without an EIA Act);
- (c) uniform Approvals Processes (with or without an Approvals Act);
- (d) an Office of Public Disputes;
- (e) retention and/or creation of resource-specific decentralized administrative tribunals.

6.6.3 A "combination" EDR system to include:

- (a) retention of resource-specific legislation;
- (b) uniform EIA process (with or without an EIA Act);
- (c) uniform Approvals process (with or without an Approvals Act);
- (d) an Office of Public Disputes;
- (e) a Land and Environment Tribunal.

As indicated, there are a number of components common to each system, each of which has been discussed in detail in the preceding section.

The common elements of each of these options are:

- (a) a uniform EIA process across all jurisdictions;
- (b) a uniform Approvals Process across all jurisdictions;
- (c) an Office of Public Disputes to provide an alternative process to litigation in the resolution of disputes;
- (d) administrative tribunals.

The systems vary on the issue of whether existing resource-specific legislation and appeals processes are retained or whether a rationalized and a centralized system of land-use and environmental legislation, including a Land and Environment Tribunal, is adopted.

All systems warrant further investigation so that the advantages and disadvantages of each can be evaluated. It is imperative that industry and the community are able to input to this process. Nevertheless, the final decision will no doubt be made by Cabinet, following considerable bureaucratic and Ministerial negotiation.

It is however recommended that an integrated EDR system be established to incorporate the following:

- (i) **Review and rationalization of environmental legislation**, in particular that relating to all aspects of land-use planning and land management;
- (ii) **Introduction of a uniform EIA process supported by legislation if necessary and enforceable across all jurisdictions;**
- (iii) **Introduction of a single Approvals Act and a uniform approvals process for all applications for development irrespective of complexity and scale;**
- (iv) **Creation of an Office of Public Disputes to provide a state-wide focus and a mediation service for the resolution of public/environmental disputes;**
- (v) **Creation of a Land and Environmental Tribunal to hear and determine all land-use and environmental disputes that proceed to a hearing;**

It is only by having an integrated system of equitable, accessible and accountable processes for the resolution of environmental disputes that Tasmania will be able to keep pace with the potentially negative consequences of resource development in the State.

6.7 Conclusion

The 1990s will be a decade of challenges, not the least of which will be the juxtaposition of the economic rationalism of the 1980s with the environmental demands of the nineties in the lives of "ordinary people". The past decade has seen the environmental awakening of middle-Australia to the point where policies on environmental issues are major determinants of electoral success. It is predicted that the 1990s will see a further extension of this environmental renaissance, within industry and the population generally.

Whatever sceptics may say about their motives, corporations are now

making a concerted effort to ensure that their development proposals take account of environmental impacts to a greater degree than has been the case in the past. These changes in corporate consciousness can be attributed to a combination of factors - increased environmental protection legislation; litigation by public interest groups; increased public pressure and the use of confrontationist strategies to ensure minimum impact development; and powerful media coverage of high profile disputes in picturesque locations. The costs of this era of confrontation, both direct and indirect, have been enormous for government, industry and the public. As a consequence, there is increasing support from all sectors, including members of the judiciary, for more effective ways of preventing and resolving complex and costly environmental disputes as society strives for sustainable development as the solution to resource management issues.

The catchcry of the 1990s will undoubtedly be sustainable development, a coat of many colours, whose cloth will undoubtedly be cut to suit the wearer. Regardless of how "sustainable development" is interpreted in Tasmania, environmental conflicts and disputes will continue as parties endeavour to reconcile diminishing resources with the maintenance of a technologically-oriented and affluent lifestyle and an increasing population.

A review of the literature revealed that most of the writings on environmental mediation have been published since the mid 1970s, although alternative dispute resolution (ADR) techniques have been an integral part of traditional decision-making in some Asian and South American countries for centuries. ADR has also been in formal use in the USA since the early twentieth century for the resolution of labour-management, community justice and social issues.

The use of mediation and other non-adversarial techniques in the resolution of environmental disputes is, therefore, relatively recent. Most of the literature is North American in origin, principally from the USA. The late 1970s saw a more gradual development of EDR processes in Canada than had been witnessed in the USA. Canadian writers attribute this more cautious approach to differences in the political systems of the two countries and the lack of comparable objection and appeals systems in the USA, so that parties have no option but to resort to mediation as

an alternative to litigation. In Canada, on the other hand, there seem to be greater opportunities for mediation to effectively complement litigation as part of the impact assessment and approvals processes. It is also available as alternative to litigation.

Comparisons can most readily be made between the Canadian and Tasmanian scenarios, both having a Westminster system of government, a judicial system based on the common law, and similar environmental decision-making and dispute resolution judicial and administrative mechanisms. It is therefore conceivable that the development of environmental mediation in Tasmania is likely to more closely approximate the rather cautious and complementary approach of Canada, than that of the USA where mediation is more often used as an alternative to, rather than as a complement of, litigation.

In the absence of any literature on the use and potential of environmental mediation in Australia, this study breaks new ground and provides a benchmark for the future. As a minor coursework thesis, it has been necessary to set boundaries and the dimensions of the study have of necessity been restricted to the identification of mediation opportunities within existing judicial and administrative decision-making systems and recommendations for future directions for Tasmania as outlined in the objectives of the study.

This has meant that, among other things, that the penetration of politics into EDR has not been able to be fully addressed. Clearly the influence of intergovernmental, intragovernmental, interdepartmental, and other politics will have a significant influence on the potential for success of the mechanisms and processes proposed..

The thesis has also identified a number of issues associated with the development and use of environmental mediation which warrant further study, in particular the evaluation of the effectiveness and efficiency of environmental mediation as a non-adversarial alternative to litigation in the Australian context. The professionalization of mediators and the institutionalization and funding of mediation services to ensure their availability, continuity and neutrality also need further examination. Perceptions of mediation as second-rate justice need to be investigated in anticipation of an anti-mediation backlash from the legal and planning

professions which have traditionally been the mainstay of environmental law. Finally, the major issue of the politics of environmental mediation as a reactionary, or at least conservative, phenomenon in environmental politics must be more thoroughly analysed, following as it does in the wake of the mediation euphoria of the 1980s.

The focus of this thesis has been environmental dispute resolution in Tasmania, however the concepts and recommendations are readily transferable to environmental dispute resolution systems and scenarios elsewhere in Australia. There remains a lot of work to be undertaken - a Pandora's box of doctoral theses - but it is hoped that the demonstrated potential of mediation as a proven, non-adversarial process for the resolution of environmental disputes will go some way towards encouraging a more cooperative and collaborative transition to the twenty first century.

APPENDIX I

ENVIRONMENTAL DECISION MAKING SYSTEMS

The definition of a system depends on who defines it - a public administrator, physical or social scientist, or lawyer - and how and why it is defined. For example, the Macquarie Dictionary (1985) states that a system is:

an assemblage or combination of things or parts forming a complex or unitary whole.

On the other hand, Buckly in Metcalf (1977: 35) defines a system as:

A complex of elements or components directly or indirectly related in a causal network, such that each component is related to at least some others in a more or less stable way within any particular period of time.

Environmental decision making systems are essentially anthropocentric decision making systems which focus on environmental matters or issues - environment being broadly defined to include political, economic, social, cultural, and biophysical factors.

Environmental decision making systems are open rather than closed systems; they are dynamic, and process oriented, and their formal and informal components are interrelated and interdependent. It is these interrelationships that constitute the structure of the system (Buckly in Metcalf 1977).

The dynamic and interrelated nature of such systems means that a decision taken in relation to any one component of the system, will impact on other components or subsystems of the whole. For example, Environmental Impact Assessments, approvals, objections, and appeals can be considered as components of subsystems of a larger environmental decision making system - that is, they are all subsystems of a larger system, such as land use planning.

Traditionally, environmental decision making systems comprise a judicial framework enshrined in legislation, administered by a bureaucracy which interprets and implements the legislation, and directed and supported by a public policy process to formulate policy options. The public service/bureaucracy is central to any environmental decision making system as it is charged with managing public goods, such as a resource, in the public interest.

However as Davis *et al.* 1988 note:

Although Australian systems of government are based on the Westminster system which sets up lines of decision making and implementation via public servants, ministers and parliament the fragmentation of the state makes it difficult to identify a single decision making process (1988: 107).

Environmental decision making systems are also subsystems of both State and Federal systems of government and decision making and while there are commonalities among them, and they are interdependent and interrelated in land use planning and management, they remain resource specific. The resulting fragmentation and sequential nature of decision making supports the comments:

government decision making tends to be fragmented, *ad hoc* and sequential (Davis *et al.* 1988: 81).

In fact, a fundamental flaw in environmental decision making at both State and at Federal levels is that environmental decision making systems are resource focused and promote duplication and fragmentation rather than an integrated approach to environmental decision making. Such a decision making environment must therefore be conducive to, rather than preventative of, the development and escalation of environmental disputes.

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